No. 4452

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM CARLSEN, JOHN SAUDER and AETNA LIFE INSURANCE COMPANY (a corporation), claimants,

Appellants,

vs.

A. PALADINI, INC. (a corporation),

Appellee.

BRIEF FOR APPELLANTS.

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I.

STATEMENT OF THE CASE.

A. THE CASE A LIMITATION OF LIABILITY PROCEEDING.

The caption appearing on the apostles on appeal is inaccurate, and may be somewhat misleading if not corrected at the outset. This appeal is from a final decree of the District Court in a Limitation Of Liability Proceeding, wherein A. Paladini, Inc., the appellee, is the petitioner, and appellants are the claimants. Appellants are not "Claimants of the Motorship 'Three Sisters' ", as they are de-

(NOTE: Numerical references are to pages of Apostles.)

scribed in the caption of the apostles, but claimants in the Limitation Of Liability Proceeding filed by appellee, as owner of the motorship "Three Sisters", to limit liability for personal injuries sustained by appellants Carlsen and Sauder while on that vessel to her value. The matter was referred to a Commissioner to appraise the "Three Sisters", his appraisement was approved, and a stipulation in the sum of $15,918.00 for such appraised value was filed (3). Actions at law which appellants Carlsen and Sauder had filed in the Superior Court of California were stayed, and appellants filed their claims and answers to the petition in the limitation proceeding. It was stipulated by appellee that claimant Aetna Life Insurance Company might intervene and file claims and answers in the limitation proceeding (29), which it did (30). The intervention of the Aetna Company was for its protection as insurer of the employer of Carlsen and Sauder against liability for compensation, in which capacity it became subrogated to the rights conferred by Section 26 of the California Workmen's Compensation Act upon such employer, and hence to a first lien against any judgment recovered by the employees Carlsen and Sauder, for the amount of compensation advanced or expended for them (30-35).

B. A BRIEF SUMMARY OF THE FACTS.

The facts, to which more detailed reference will be made in the proper course of the brief, may be

briefly stated as follows: Healy-Tibbitts Construction Company, a corporation, about April 25, 1923, entered into a contract (Petitioner's Ex. No. 1, 443-462) with appellee, A. Paladini, Inc., the owner of the motor boat "Three Sisters", for the construction, for appellee, of a wharf at Point Reyes. Appellants Carlsen and Sauder were employees of the Healy-Tibbitts Company, and as such were engaged in the building of said wharf. The letter (443-445), comprising part of the agreement between Healy-Tibbitts Company and appellee, provided that appellee should freight and deliver at Point Reyes all materials and equipment necessary to complete the wharf; that during the work appellee should deliver supplies for the men on the work three times a week; and that on completion of the wharf appellee should transport all equipment back to San Francisco.

Appellee's vessel "Corona" transported appellants Carlsen and Sauder, together with the other men employed by the Healy-Tibbitts Company, from San Francisco to Point Reyes at the commencement of the work. During the work appellee transported the supplies for it from San Francisco to Point Reyes, sometimes on its vessel "Corona", which went to Point Reyes for salmon (80, 83, 99, 100), sometimes on its vessel "Three Sisters". On week ends appellee transported divers of the Healy-Tibbitts Company's men who were engaged in constructing the wharf back and forth between Point

Reyes and San Francisco, sometimes on the "Corona", sometimes on the "Three Sisters", depending on which of the vessels happened to be making the trip at the time (Captain Kruger, 114 to 119, 144; Carlsen, 288, 289).

Appellee chartered from the Crowley Launch & Tugboat Company, the barge "Crowley No. 61", by a charter under which appellee assumed all responsibility arising from use of her by appellee (Claimants' Ex. B, 469). Obviously it was a *demise* charterparty which conferred upon appellee full possession and control of the barge. Appellee, on May 10, 1923 (283, 287), towed this barge, upon which a pile-driver furnished by the Healy-Tibbitts Company had been placed, from San Francisco to Point Reyes with its vessel "Three Sisters". Appellee, with the same vessel, on June 8, 1923, when the wharf had been completed, started to tow the barge from Point Reyes to San Francisco, with the pile-driver on board. The barge was made fast to the "Three Sisters" by a *7 inch manila line*, one end of which was made fast to the mast of the "Three Sisters", and the other end to a *thimble and swivel*. The timble and swivel were connected to a *bridle made of 5/8 or 7/8 inch steel cable*, the ends of which were made fast to towing bitts on the forward port and starboard corners of the barge, respectively.

On June 5, 1923, the "Three Sisters" went from San Francisco to Point Reyes to get the barge, but

her master was informed by appellant Carlsen, the foreman of the Healy-Tibbitts Company on the work, that they were not yet through with the pile driver and by him was requested to wait until they were ready. Accordingly the "Three Sisters" waited there for 3 days, alongside a fish barge, her captain sending word of the delay to appellee by the "Corona" (Cap. Kruger, 83; Andersen, 165; Carlsen, 290). *Appellee's port captain, Davis,* was at Point Reyes on June 7, 1923, the day before the "Three Sisters" started for San Francisco with the barge "Crowley No. 61" in tow, and appellant Carlsen told him that the captain of the "Three Sisters" was waiting for him, that the men were going back to San Francisco on her (Carlsen, 291, 292). On June 8, 1923, appellant Carlsen informed Captain Kruger that they were through with the wharf, and the "Three Sisters" then went to the Booth wharf at Point Reyes, picked up the camping utensils and luggage of appellants and the other men, and started for San Francisco with the barge in tow (Kruger, 85, 86; Andersen, 166, 167; Carlsen, 291, 292). Captain Kruger did not know whether the "Corona" was coming to Point Reyes on the day he left with the tow (Kruger, 84). An hour and a half after the "Three Sisters" left Point Reyes with the barge in tow, when, to use the language of appellee's counsel in summarizing the situation to appellee's expert witness (396) "the time was on the afternoon of June 8, 1923; *the weather was fair; the wind was light north-*

westerly; the sea was smooth except for westerly ground swells of the kind usually encountered in those waters at that time of the year", the *steel* bridle broke in *two* places, with the result alleged in appellee's petition: "the tow line whipped back and struck the said Carlsen and the said Sauder, inflicting upon them certain bodily injuries" (9). Appellants were at the time of the injury seated on the starboard side of the after deck of the "Three Sisters", playing cards with two other of the Healy-Tibbitts Company men, three or four feet away from the towing hawser (Cap. Kruger, 101). The blow knocked both men unconscious (Kruger, 96). They were injured on Friday, June 8, 1923. Carlsen did not recover consciousness until the following day (Carlsen, 335, 6), and Sauder did not recover consciousness for days later (Sauder, 436, 439). Sauder's skull was fractured, vertebrae in Carlsen's neck were dislocated, cord torn away from his skull, and his jaw injured (Carlsen 436).

C. CERTAIN DISPROVED ALLEGATIONS IN APPELLEE'S PETITION.

Before passing to the specification of errors and the argument, attention is called to the allegations in appellee's petition (7) to the effect that appellee maintained a "regular service" by the motorship "Corona" for the transportation of persons and property from Point Reyes to San Francisco, "which service was at said time used for the accom-

modation of the employees of Healy-Tibbitts Construction Company, and the said motorship 'Three Sisters' was not used in said service". The purpose of such allegations is plain: to show that appellants were not passengers or properly on the "Three Sisters". Such allegations (denied in appellants' answers, 17, 36) were clearly *disproved,* however, *by appellee's own witness Kruger,* who testified concerning his general and uncountermanded, standing orders with respect to the transportation of appellants and other passengers as follows:

> "Q. Then I still say you had orders from the port engineer, did you not, that if at any time the 'Corona' was not in San Francisco and the men wanted to go to Point Reyes, you were to take them on the 'Three Sisters'?
>
> A. *Yes, sir.*
>
> Q. And the same way, if at any time you were up at Point Reyes and the 'Corona' was not there, and the men were to come back, you were to bring them back?
>
> A. *Yes, sir.*
>
> * * * * * * *
>
> The COURT. I think he has made it clear, Mr. Heidelberg. He does not get this question, *but he has said that his general orders were to get these men when the other boat was not here"* (Kruger, 117, 118; also 114 to 119).
>
> "Q. When you said the 'Corona' carried passengers, you didn't mean to say that the 'Three Sisters' did not carry passengers, did you?
>
> *A. I carried passengers in case when the other boat was not up there"* (Kruger, 144).

The testimony of Kruger is corroborated by that of appellants' witnesses Carlsen (288-293), Urqu-

hart (43), Evans (339, 340), Haney (252), Reid (363), Rowe (423), Sauder (438).

Clearly related to the above disproved allegations in the petition, is the further allegation (7), with the same purpose, that:

> "When said Carlsen and said Sauder, and the said other men, ascertained that said motorship 'Three Sisters' was about to depart from the port of Point Reyes for the port of San Francisco, towing said barge, they refused to await passage on said motorship 'Corona' and boarded said barge."

These allegations (denied in appellants' answers, 17, 36), were clearly *disproved* by the above quoted testimony of appellee's *own master,* as well as by that of appellants' witnesses. They were also disproved by the testimony of Kruger:

> "Mr. LILLICK. Q. I am speaking of the time when they came on board the 'Three Sisters', did you ask them to come on, or did they ask you to come on, or how did that happen? A. They said they wanted to go down, *and I said 'All right'"* (Kruger, 94; also 83, 85, 86, 93, 95; Anderson, 167; Carlsen, 290-293; Reid, 364, 365).

In view of this testimony of appellee's *own master,* there can be no doubt that *appellants and the other five men who came down on the "Three Sisters"* were passengers:

> "The circumstance that the passenger was a 'steamboat man', and as such carried gratuitously, does not deprive him of the right to redress enjoyed by other passengers. It was

the custom to carry such persons free.

The master had power to bind the boat by giving such free passage."

The New World, 14 L. Ed. 1019 (Head Note); 16 How. 467. Appeal from Nor. Dist. of Calif.

"The expression 'passenger' shall include any person carried in a ship other than the master and crew, and the owner, his family and servants."

English Merchant Shipping Act, 1894, Sec. 267, printed in Maclachlan's Merchant Shipping 6th Ed., p. 640; Abbott on Shipping, 14th Ed., p. 1160.

See also:

Re Calif. Nav. & Imp. Co., 110 Fed. 670 (N. D. Calif.);

Steam Dredge No. 1, 122 Fed. 679;

The Wasco, 53 Fed. 546 (N. D. Wash.).

Hereafter, in the proper course of the argument, several other disproved and unproved material allegations in the petition which are denied in appellants' answers, will be noted.

II.

THE DECISION OF THE DISTRICT COURT AND SPECIFICATION OF ERRORS.

The opinion of the court below is printed in the apostles, pages 471-474. The assignment of errors

is to be found therein at pages 481-487. All of the errors assigned are hereby specified. The sum and substance of them is that the District Court erred in not holding that appellee is liable for the injuries sustained by appellants Carlsen and Sauder, and that appellee is not entitled to limit such liability to the value of the "Three Sisters". This, of course, involves the error that the court should have found that appellee corporation was negligent through and by its servants, and privy thereto so as to defeat limitation of liability. Particular attention is directed to the errors assigned under numbers IX to XXIX (483-487) which specify the particulars in which the court below erred in these respects. The positive findings of fact to which exception is taken in Assignments IX, X, XII, XIII, XIV are specially emphasized as being *wholly unsupported by the record, and, moreover, as incorrectly applying the legal doctrine of "inevitable accident"*. Assignments XXX and XXXI (487) are based upon the absence of any right in appellee to limit liability because of non-compliance with the statutory condition precedent that the vessel should have been inspected.

The errors are all seriously assigned and specified, and will be more particularly adverted to at appropriate points in the argument.

III.

THE ARGUMENT.

A. EFFECT OF THIS APPEAL AS A TRIAL DE NOVO OF THE CASE WITH RESPECT TO THE DISTRICT COURT'S FINDINGS OF FACT AND OMISSIONS TO FIND FACTS.

This appeal in admiralty, being a *trial de novo* of the case, the decree of the District Court has been vacated:

Reid v. Fargo, 241 U. S. 544; 60 L. Ed. 1157;
The Schooner John Twohy, 255 U. S. 77; 65 L. Ed. 511.

In the instant case all of the testimony was taken before the District Judge with the exception of the deposition of Urquhart (41-55). It is not expected, therefore, that this court will not give weight to the findings of the lower court where such findings involve *conflicting* evidence the *value* of which depended upon the *credibility* of the witnesses who were heard in open court.

But findings *contrary to all* of the evidence, or *against the decided weight* of the evidence, or *unsupported by any* evidence, will be disregarded; and where the lower court omitted to find facts material to the issues, notwithstanding they are proved by the evidence, *this court will review the case on such facts unaffected by any finding of fact of the court below:*

The Fullerton, 211 Fed. 833, at 834 (C. C. A. 9);
Hughes on Admiralty, 2nd Ed., pp. 419, 420;
The Kalfarli, 277 Fed. 391, at 397-399 (C. C. A. 2).

And as to the deposition of Urquhart, *who was not heard or seen by the court below,* this court's position is as good as was that of the District Judge:

The Santa Rita, 176 Fed. 893 (C. C. A. 9);
The Kalfarli, supra.

Appellants, in view of these principles, ask that this court *assume* that the *appearance* and *manner of testifying* of appellee's witnesses was *the most favorable that could be presented to eye or ear.* But appellants further request that where it is apparent *from the very substance* of the testimony of appellee's witnesses that they had *no actual recollection or knowledge* of the matters concerning which they were testifying, or that they were not testifying from *actual memory* of such matters, but merely from *imagination or inference* turned into or confused with recollection, *this court then use the combined intelligence of the three judges of which it is composed, without regard to the lower court's findings.* These remarks are to be specially borne in mind in reading the testimony of appellee's witness Davis (176-223); also that of appellee's witnesses Carlton (352-362) and Kruger (69-127; 136-147), in the particulars which will be designated in the argument. It will be noted that the references herein are to the testimony of *petitioner's own witnesses,* and to that of claimants' witnesses only where it is *corroborative* of petitioner's witnesses or *not in conflict* with them.

B. THE TWO ISSUES INVOLVED: (1) LIABILITY; AND (2) THE RIGHT TO LIMIT LIABILITY.

There are two distinct issues presented in this case.

The one issue is whether the petitioner was *negligent.* If it was *negligent,* either directly or *through its servants,* it is liable to the two injured claimants. There is involved in this issue no question of privity of knowledge on the part of the petitioner, and the ordinary doctrine of *respondeat superior* obtains.

> "The effect of the act is stated with conciseness and perspicuity by Mr. Justice Gray in Liverpool Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, as follows:
>
> 'That act leaves them (the shipowners) liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew.' "
>
> Wolverton, J.: *Oregon Lumber Co. v. Portland & Asiatic SS. Co.,* 162 Fed. at 922 (D. C. Ore.).
>
> (Unseaworthiness found, and limitation denied.)
>
> *Diamond Coal & Coke Co. etc.,* 297 Fed. 246 (C. C. A. 3); Cert. Denied 68 L. Ed. 721.

The other issue is whether, the petitioner being guilty of negligence, its *liability* may nevertheless be limited to the surrender value of the "Three Sisters". If the case is one to which the statute permitting limitation of a shipowner's liability applies (and claimants assert that it is not such a case because of the statutory condition precedent

of inspection in the case of carriage of passengers), then in this issue the doctrine of *respondeat superior* is subject to qualification by virtue of the statute: *if the limitation of liability act is applicable,* the question of privity or knowledge on the part of petitioner is an issue.

It is respectfully submitted that the petitioner was *solely* at fault, and that it is not entitled to limit the liability for such fault; so that it is liable for the *full* damages actually sustained by the two men, although the amount of such damages may exceed the surrendered value of the "Three Sisters". It will be shown, *first,* that petitioner was *negligent,* without contributory negligence on the part of the men, and *then,* that it is *not entitled to limit* its liability for the full consequences of such negligence, because the limitation of liability law is not *applicable,* and even if it were applicable, petitioner *has not shown that it was without privity or knowledge* of such negligence.

First: The Petitioner Was Negligent.

The petitioner was negligent in divers particulars, which will now be designated. The issue of whether petitioner was negligent or not is raised by the *answers* (16-19; 30-40) of claimants to the petition (5-15). The *claims* of claimants, of course, were filed with the Commissioner, in accordance with the required practice in limitation proceedings *(Supreme Court Admiralty Rules,* 52, 53). The

main issue of negligence is the insufficiency of the bridle which the "Three Sisters" used to tow the barge; but there are other issues of negligence, corollary thereto. All of such issues are raised by the allegations of the petition and the denials thereof and allegations thereabout in the answers.

1. The Bridle and Swivel Used by the "Three Sisters" to Tow the Barge and Pile Driver Were Unsound, Rotten and Defective.

(a) Res Ipsa Loquitur.

It is respectfully submitted that there cannot be any doubt that the claimants are entitled to a decree adjudging petitioner negligent. Without resort to any of the record save petitioner's petition, statements of its counsel and the testimony of its witnesses, it is apparent that the bridle was defective. The facts established a *prima facie* case which petitioner has in no way rebutted. Indeed, as claimants' proctors pointed out in their opening statement (61, 62, 63, 67, 68, 69), the petition itself makes a *prima facie* case for claimants. But the record itself, as now will be demonstrated, *does not prove even the meager allegations of the petition,* with respect to such breakings of the bridle. The portions of the pleadings and the record pertinent to this point will first be designated, and then the law in the light of which they must be construed.

(a') The Facts.

The only allegations in the petition with respect to how the bridle broke are the following:

"While on said voyage, and while towing said barge, in the morning of the eighth day of June, 1923, and while out of said port of Point Reyes about *one hour and thirty minutes,* and off the coast of California, said Motorship and her tow encountered a *succession of long ground swells.* Upon encountering said ground swells the Master of said Motorship caused her to proceed on said voyage under half speed. The Master was at the wheel. *Suddenly while said Motorship was on the receding side of one of said ground swells,* and while going at half speed as aforesaid, the one side of the bridle upon said barge *was seen by the Master* of said Motorship *to part.* The Master immediately thereafter, and before any further breaking of said bridle, *disconnected* the engines of said Motorship from her propeller shaft, *but while not under any power from said Motorship, but while being carried forward by the force of said ground swells and of the sea,* the *other side* of said bridle upon said barge *parted,* completely disconnecting said Motorship from her tow" (Petition, 6, 7).

"Upon the parting of the bridle upon said barge, *the tow line whipped back and struck* the said Carlsen and the said Sauder, inflicting upon them certain bodily injuries" (Petition, 9).

The breaking was described as follows in the opening statement of petitioner's proctors:

"*One* side of this bridle broke; therefore, the *other* side broke—carried away—and the tautened line, suddenly giving away, whipped or in some way struck two of these men who were playing cards" (60).

"Mr. Lillick. Your Honor, I am somewhat at a loss to comprehend the point Mr. Bell has been seeking to cover. It would seem to me

that he has said that because we have not used the phrase 'perils of the sea' we are foreclosed from proving how the accident happened and what occurred.

The COURT. No, I don't think that, Mr. Lillick. I could not agree with that. I think you had better go ahead with your evidence.

Mr. LILLICK. It was only for the purpose of having a statement from Mr. Bell as to whether he claims that the allegation of this petition, reading from page 2:

'But while not under any power from said motorship, but while being carried forward by the force of said ground swells and of the sea, the *other* side of said bridle upon said barge parted'—

is not a statement that because the disconnected engine of the motorship *left her on the sliding edge of a ground swell, forcing her one way, and that the barge at the other end of the hawser upon a receding swell taking her the other way, and by the force of the sea parting the line.* However, I think we need not take up any time in that type of discussion here, because the testimony certainly will be admissible and it will be for the court to decide.

Mr. BELL. My point is *that there is no allegation of any extraordinary weather, or any peril of the sea, or any extraordinary sea, or anything of that kind.*

Mr. LILLICK. That was the part of it that was giving me concern, your Honor, the statement, now repeated by Mr. Bell, that we made no allegation that the loss was due to a peril of the sea. We did not call it a peril of the sea, but it was a loss that could only come from a *venture that was involved in a peril of the sea.*

The COURT. Mr. Bell's point was, I think, that the allegations of the petition practically amount to *an occurrence that ordinarily might*

> *be expected at sea* and, therefore, not a peril of the sea" (67-69).

The petition and the record show that the breakings of the bridle occurred during the short voyage from Point Reyes to San Francisco, during the day-time, and only about an hour and a half after the vessel left Point Reyes (Pet. 6). There is no allegation that there was any fog, and it is apparent from the record that there was none. The course of the vessel from the bell buoy at Point Reyes to the time of the accident was uniform: E by S½S, and during that time the ground swells were westerly (Cap. Kruger, 175), from the starboard quarter of the vessel (Cap. Kruger, 97, 98, 175). There was no sea breaking, she shipped no water, there was not even any spray, and she was absolutely dry (Cap. Kruger, 97, 104, 145).

> "The COURT. Q. Where was the wind?
> A. Very light northwester. It was right astern of us. There was just an *ordinary* heavy ground swell" (Cap. Kruger, 104).

The hawser connecting the "Three Sisters" with the bridle was a 7 inch *manila* line (Cap. Kruger, 73), *which did not break* (Haney, 258). The bridle, although a 5/6 inch or a 7/8 inch *steel* cable (Figari, 157, 158; Westman, 156; Davis, 179; Lingenfelter, 396) *broke in two separate places* (Petition, 6, 7; Cap. Kruger, 96). The legs of the bridle were each 35 feet long (Westman, 150). Petitioner offered *no* evidence to show where, on the bridle, the two breaks occurred (see Tr. 220), but claimants' un-

contradicted testimony shows that *one break* was *on one leg* near the thimble connecting the steel bridle to the manila rope, and the *other* break was on the other leg near the bitt on the barge (Haney, 258, 259; Reid, 371; see Petition 6, 7). Petitioner did not produce the *broken bridle, although no part of it or the thimble or swivel attached to it was lost when it broke* (Kruger, 145, 146; Haney, 259), nor did it offer any testimony as to its condition after it was broken, or of the nature of breaks. Claimants' witness described the break near the thimble as "a ragged break" (Haney, 259).

The bridle was part of the equipment of the "Three Sisters" (Davis, 183; Cap. Kruger, 91, 92, 76, 77, 80, 81, having been borrowed by her owner from Crowley Launch & Tugboat Co. through Healy-Tibbitts Co. (Horten, 128). It will be remembered that Paladini Co. chartered the barge from the Crowley Co. (Paladini, 227; Claimants' Ex. B, 469, 470). The hawser was affixed to the bridle at Point Reyes just before the voyage under consideration began, by the master of the "Three Sisters" and his deck-hand Anderson (Cap. Kruger, 77, 92). Bridle and hawser were then on the stern of the "Three Sisters" (Cap. Kruger, 77, 91; Carlsen, 313), and were passed by Anderson, the deck-hand of the "Three Sisters," from her to Urquhart and Reid, who were on the barge, and who slipped it over the bitts on the barge (Cap. Kruger, 91; Reid, 365, 366; Urquhart's Deposition, 49). The hawser was connected to the bridle by a thimble and

swivel, and there is no evidence that either of these appurtenances broke, or that the equipment on the "Three Sisters" or the barge to which bridle and hawser were fastened broke. None of them was produced at the trial. It would seem that the hawser was made fast to the mast of the "Three Sisters," although her master in one place says it was to her starboard bitt (Cap. Kruger, 90, 91).

The dimensions of the "Three Sisters" appear accurately in license (Petitioner's Ex., 3, 466) as length, 56.3, breadth, 15.6; depth, 6 feet. The dimensions of the barge do not seem to be shown by the record. She had a pile-driver, a donkey engine, her usual appurtenances, and some piling aboard of her.

The master of the "Three Sisters" *saw the bridle break twice,* but his only description of it or the position of the respective vessels at the time is the following:

> "Q. What was the first thing you know about anything happening?
>
> A. I was standing in the pilot house and Mr. Anderson, the deckhand, was alongside of me; he was at the wheel, and I was looking out of the window of the pilot house, just by the pilot house control, and *I seen the port side of the bridle break,* and so I put the boat neutral, *but the boat had so much force that the other side of the bridle broke.* That is all I seen of the accident. I think Scotty said somebody got hurt. I went back there and I seen Mr. Sauder and Mr. Carlson unconscious" (Cap. Kruger, 96).

There is not a word of evidence in the record to account for the *first* break of the bridle, *nor is it attempted to be accounted for* in the Petition or even in the statements of counsel (see quotations, supra). Moreover, while the Petition and statement of petitioner's proctor (see quotations supra), as to the second break, say that *after the first* break, the "Three Sisters" was "on the receding side of one of said ground swells" when the *second* break occurred, *even they do not attempt to fix the position of the barge at that time.* And the *evidence,* as is apparent from the above quoted testimony of the master, *does not fix the position of either the "Three Sisters" or the barge at the time of either break.* Nor did the petitioner even *attempt* to fix the position of *either* vessel at the time of *either* break, *proctors for petitioner not even putting a question to the master with respect thereto,* although he testified that he actually saw the bridle break the first time and the second time. Deckhand Anderson did not see the bridle break (Anderson, 168).

At the time of the breakings of the bridle Anderson, the deckhand on the "Three Sisters" was at her wheel, and her master was in the pilot house alongside of him (Cap. Kruger, 96). When the master saw the *port* side of the bridle break he put the vessel in neutral, but notwithstanding the strain placed upon the bridle by the engines of the towing vessel was so removed, the *starboard* leg of the bridle broke (Cap. Kruger, 96).

When the bridle broke the two injured men were playing cards with two other men, all being seated on the starboard side of the after deck of the "Three Sisters" three or four feet away from the towing hawser (Kruger, 101). Upon the breaking of the towline it whipped back and struck Carlsen and Sauder (Petition and Statement of Proctors, supra). The blow knocked both men unconscious. (Cap. Kruger, 96). They were injured on Friday, June 8; Carlsen did not recover consciousness until the next day (Carlsen, 335, 336), and Sauder did not recover consciousness for days later (Sauder, 463, 439). Sauder's skull was fractured, vertebrae in Carlsen's neck were dislocated, cord torn away from his skull and his jaw injured (Carlsen, 436).

Beyond question the facts present as perfect a case for the application of the doctrine of *res ipsa loquitur* as can be imagined. The weather conditions obtaining at the time are summarized in the hypothetical question put by Mr. Lingenfelter to his witness Mohr:

> "The time was on the afternoon of June 8, 1923. The weather was fair; the wind was light northwesterly; the sea was smooth except for westerly ground swells *of the kind usually encountered in those waters at that time of the year*" (Mr. Lingenfelter, 396).

And yet the *steel* bridle broke in *two* separate places, one on *each* leg, though the single *manila* hawser which bore the *entire* strain of the tow remained unbroken, as did the fixture on the "Three

Sisters" to which it was made fast, and the bitts on the barge to which the bridle was attached.

From these facts, concerning which there is no dispute in the record, it must be apparent how well founded are Assignments of Error IX, X, XI, XIII, XIV, XV, XVI and XVII (483-484). There is *not only no evidence* supporting the statement in the District Court's opinion that the vessel "encountered a *very heavy* ground swell" (473), *but the petitioner's own evidence* shows that only the *ordinary* ground swell usually encountered in the waters in question was encountered. If, as the opinion further states, "the evidence satisfactorily shows that the real cause of the accident was these ground swells" (473), it *also thereby* shows that the two breakings of the steel bridle and the consequent injury to claimants *were not due to inevitable accident, but to the defective, insufficient and unseaworthy condition of such bridle and/or the negligent operation of the tow.* Moreover, the evidence does not show that the cause of either of the breakings "was these ground swells." *There is not a word of evidence,* as has been demonstrated, supporting the statement in the opinion that "the evidence shows that owing to the ground swells, the 'Three Sisters' was lifted on the crest of the swell at the same time the barge went down into the trough, thereby causing an unusual strain upon the cable" (474). It has been shown above that *not even the allegations of the petition nor the opening statement of petitioner's counsel, much less the evidence, attempt to*

account for either the first or the second break in this or any other manner. Moreover, even *if* the breaks were caused in the manner erroneously stated in the opinion, it would but prove that they were *not due to the inevitable accident,* but to the defective, insufficient and unseaworthy condition of the bridle, or the negligent operation of the two. The conclusion expressed in the opinion that "the evidence is convincing that the accident was either an inevitable one, or else that it was due to the ground swells" (474) *cannot support a decree for petitioner,* and therefore it is for this court to consider the whole case and come to *its own determination,* just as it did in the remarkably similar instance of *The Fullerton,* where it said, in reversing the lower court's decree which held a collision due to inevitable accident:

> "In so disposing of the allegations in the libel against the appellee, the court omitted to find facts which were material to the issues and which were proven by the evidence, and the case comes here for review upon the facts, so far as they concern the conduct of the officers in command of the Transit, *unaffected by any finding of fact of the court below* (Citing cases)."
>
> Gilbert, J., in *The Fullerton,* 211 Fed. at 835.

In the case at bar the court *first found facts unsupported by and contrary to the evidence,* and then reached a conclusion which would be untenable and indecisive of the case *even had the facts found been supported by the evidence.*

Some of the numerous authorities illustrative of the law of *res ipsa loquitur* and inevitable accident will now be noted. With the above facts in mind, the application of them will be self evident. It will be appreciated that such authorities clearly show that the doctrine is not limited to cases where contractual obligations exist, *but is peculiarly applicable to pure tort cases.* It would therefore apply *even* had the injured men not been passengers on the "Three Sisters," though they plainly were passengers. That they were not trespassers, but were aboard at the express and implied invitation of the master of the vessel, petitioner, at the least, must admit. It will be noted in the following authorities that vessels must even anticipate the occurrence of storms, and cannot assume the continued existence of cloudless skies, windless seas, *or that the swelling pulse of the ocean will un-naturally pause.* Even had petitioner offered any evidence to show the respective positions of the two vessels when either break occurred (and, as shown above, they offered *none*) so that one was on some side of some ground swell and the other on some side of another, the case *res ipsa loquitur* would be just as conclusive, because any positions of the two vessels with respect to each other *were natural and to be expected.*

(a") The Law.

> "The plaintiff was injured by the explosion of a steam boiler which was being used by the defendant to propel a vessel chartered by the

defendant to others to be used for the transportation of passengers and freight."

Rose v. Stephens Transp. Co., 11 Fed. at 438, (Cir. Ct. S. C. N. Y.).

"It is contended, however, that it was error to instruct the jury that they might infer such negligence from the fact of the explosion; and it is argued that such a presumption only obtains when the defendant is under a contract obligation to the plaintiff, as in the case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. *The presumption originates from the nature of the act, not from the nature of the relations between the parties. It is indulged as a legitimate inference whenever the occurrence is such as, in the ordinary course of things, does not take place when proper care is exercised, and is one for which the defendant is responsible.* It will be sufficient to cite two cases in illustration of the rule, without referring to other authorities." (Here the court cited *Scott v. London etc. Dock Co.,* 3 Hurl. & C. 596, in which plaintiff was injured as he was passing defendant's warehouse by bags of sugar falling from a crane by which they were being lowered to the ground. Also *Mullen v. St. John,* 57 N. Y. 567, where plaintiff, who was upon a street sidewalk, was injured by the fall of defendant's unoccupied building.) (Ib. at 439).

"In the present case the boiler which exploded was in the control of the employes of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this

boiler was not in a safe condition, or was not properly managed, was justifiable, and the instructions to the jury were correct"(Ib. at 439).

In the limitation proceedings to which claimants' proctors referred in their opening statement (67) the crank pin of a tug boat broke and her tow was lost on the rocks. The petitioner asserted *inevitable accident.* The Circuit Court of Appeals said:

> "At the time of the disaster the tug, with a tow quite usual for her, in the center of a favorable tide, carrying 115 pounds, but diminished by proceeding at half stroke, broke this crank pin. *Unless caused by inevitable accident, it is plain that the crank pin was insufficient and the tug unseaworthy.* The owner says it was caused by the propeller striking a submerged log. This is pure conjecture, *there being not the least affirmative evidence of it,* and we reject the explanation as improbable."
>
> *In re Reichert Towing Line,* 251 Fed. at 216 (C. C. A. 2.)

> "If conjecture is to be resorted to at all, we think it would be much more profitable the shaft had got out of alignment. However, *even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them.* The Merchant Prince (1892) Prob. Div. 188; The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The J. Rich. Steers, 228 Fed. 319, 142 C. C. A. 611.

The presumption of fault the Reichert Company has not overcome, and therefore it must be held liable for negligence in the limitation proceeding, and liable primarily because of the unseaworthiness of its tug in the subsequent suit brought by the owner of the Mathilde R" (Ib. at 217).

"CHARGE TO THE JURY—The owners of a towboat are not liable, as common carriers, for the safety of the boats and their contents which they undertake to tow. In the performance of the duty, they are bound to exercise ordinary care and skill in directing their movements, and are liable if the accident arose from want of such skill.

The fastenings were provided by the towboat, and it was the duty of the defendant to see that they were sufficient for the purpose, proper for securing the boats towed, under all the ordinary risks of the navigator. *Their breaking is prima facie evidence of their insufficiency, and the defendant is liable, unless he has satisfied you that they broke by reason of some cause other than their own defects."*

Leech v. Owner of Steamboat Miner, 1 Philadelphia Reports 144; 8 Leg. Int. 11.

In a limitation proceeding for the loss of a barge without motive power, used to transport excursions on New York harbor and adjacent waters, *in a sudden, violent thunder storm* Judge Benedict said:

"No doubt there are winds that nothing can withstand, and against which the owners of such vessels cannot be expected to be prepared; but my conclusion is that the wind that struck this barge, *while violent, did not exceed in violence any that might be reasonably expected in these*

waters. A vessel not strong enough to endure in safety such a wind as this barge encountered is, in my opinion, unseaworthy, and the injuries done to her passengers must be held to have arisen from the unfit and unseaworthy condition of the barge."

In re Myers Excursion & Nav. Co., 57 Fed. at 242, (D. C. E. D. N. Y.).

Affirmed: *The Republic,* 61 Fed. Rep. 109, (C. C. A. 2).

Libelant boarded a steamer, learned that he must pay an extra fare to stop at his destination, which was off the steamer's regular route, and declined to do so, but did not change his purpose of taking passage. Judge Hanford, after holding that he was nevertheless a passenger, said:

"The steamer has a stairway leading from the foreward part of her main deck to her cabin deck, and, immediately after going on board, the libelant was upon said stairway, going either from the main deck to the cabin or in the opposite direction, and while he was there the steamer's masthead light, a lantern weighing between 9 and 10 pounds, was being hoisted to its position on the mast, and, *by the breaking of the halyard,* it fell, striking the libelant on the scapula of his left shoulder. * * * *The testimony fails to disclose the cause of the accident, but it could not have happened if the halyard and appliances for suspending the light had been sound, of sufficient strength and proper construction, and there had been no negligence on the part of the officers and men employed on the steamer in the perfor-*

mance of their duties in connection with said light."

The Wasco, 53 Fed. at 547 (N. D. Wash.);

City of Kensington, 77 Fed. 655 (N. D. Wash.);

The Crescent City, 1925 A. M. C. 40 (C. C. A. 9).

"It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, *and that the lines were sufficient and securely fastened.* This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault. *The parting of the line connecting the boat in the rear on the port side with the fleet,* was the commencement of the difficulty that led to this accident. In the effort to recover this boat, the consequences followed which produced the collision. If it was good seamanship on the part of the captain of the tug to back in such an emergency, he was required, before undertaking it, *at least to know that his bridle line would hold."*

Steam Tug Quickstep, 9 Wall 665; 19 L. Ed. at 767;

The C. W. Mills, 241 Fed. at 205, 206.

"The sea was heavy and the motion of the boats in the trough of the sea abundant to account for the sinking of the two boats which were lost, of which the libelant's boat was one.

I cannot doubt, upon the evidence, that, *if the hawser had not parted,* all the boats would have reached New Haven in safety, and that the parting of the hawser was the cause of the disaster. *This breaking of her hawser casts upon the tug the responsibility of the loss which resulted therefrom.* The transportation of tows of loaded canal-boats in the waters of the Long Island Sound involves much danger and *corresponding responsibility.* The tow-boats engaged in that business must be competent in power *and equipped with hawsers of sufficient strength to hold their tows in any weather ordinarily to be anticipated in that navigation.* The canal-boats are frail, and their safety in any sea-way is dependent upon the union of many boats in one compact mass, which when kept moving together, properly lashed, experience has shown to be able to withstand all weather necessarily experienced in navigating the Sound. This union, which is the source of their strength, is maintained by the power of the tug applied by means of the hawsers, and, *in any case of disaster arising from a failure of the hawser, it is incumbent upon the tug to show plainly that its failure arose from no defect in quality or size.* In this case the hawser which parted was an *old* hawser of short length, which was eked out by bending on to it part of a 4-inch stern line. In order to hasten the tow when near New Haven, to the power of the Francis King was added the power of the Gamecock. To that strain the smaller line proved unequal, and it parted, whereby the tow was at once thrown out of shape in a chopping sea. This parting of the port hawser was the real cause of the loss of the libelant's boat, and for its failure the Francis King is responsible. * * * * I am forced to the conclusion that it was not through any fault of the libelant, *nor by reason of any unforseen and inevitable*

peril of the seas, that his boat was sunk, but because the tug-boat undertook to conduct the two with a hawser insufficient for the purpose to which it was applied."

Benedict, J.: The Francis King, 9 Fed. Cas. #5042, at pp. 690, 691 (C. D. N. Y.).

"The conclusion reached by the court upon the whole case is:

First. That the tug Nettie was not equipped, at the time of the parting of the towline, with a sufficient and suitable hawser for the purpose of performing the work in hand, as was required of her, and for loss arising thereby she is liable. The Britannia (D. C.) 148 Fed. 495, 499, and cases cited. Considerable evidence was introduced by the respondent tending to show the exercise of proper care in the selection of this hawser; *but after giving much consideration to the same, the fact that it was a spliced hawser, and parted at least twice when its strength was tested, satisfies the court that it was not a suitable and safe appliance for the service required, taking into account especially the dangers liable to, and which did, arise from encountering heavy seas in Pamlico Sound."*

The Nettie, 170 Fed. at 527, 528 (E. D. Va.);

Tugs Osceola & Hercules, 1924 A. M. C. 1030 (D. C. S. D. N. Y.) (Breaking towing hawser);

Scow H. S. Hayward, 1924 A. M. C. 242 (D. C. E. D. N. Y.) (Deficient tow-line breaking);

Barge Mamie Nelson, 1924 A. M. C. 713; 296 Fed. 107 (C. C. A. 2). (Deficient tow-line breaking).

"Second. *The tug failed to furnish a safe and suitable hawser* to perform her contract of towage, which in part caused the accident, and in consequence of which she should share in the loss sustained. It may be conceded that the tug ordinarily would not be responsible for the parting of its hawser, under the circumstances and conditions of this accident, provided due care and caution had been exercised in procuring a suitable one, which had been properly preserved and seasonably inspected; and that the tug owner should not be held liable for a hawser's breaking merely because of the happening of the event. *But when the fact is taken into account that upon this same voyage, in good weather, and smooth sea, this hawser had twice before parted, the court cannot say that the defective condition of the hawser did not cause it to part, and certainly that a sound hawser might not have averted such an occurrence.*"

The Britannia, 148 Fed. at 498 (E. D. Va.).

"The law imposed upon her the duty of making up the tow and seeing that proper lines were provided, either by the tow or herself. If those on the scow were unfit for the service, others should have been provided before entering upon the voyage, and for loss arising from such defective hawser, whether the same were furnished by the tow or tug, the latter is liable. These are obligations imposed upon and assumed by the tug from the nature of the employment, and for damages for her negligence in this respect she should be held responsible. The Quickstep, 76 U. S. (9 Wall.) 665, 671, 19 L. Ed. 767; The Syracuse, 79 U. S. (12 Wall.) 171, 20 L. Ed. 382; The John G. Stevens, 170 U. S. 113, 125, 18 Sup. Ct. 544, 42 L. Ed. 969; The Somers N. Smith (D. C.) 120

Fed. 569, 576; The Emery Temple (D. C.) 122 Fed. 180; The W. G. Mason (C. C. A.) 142 Fed. 913, 918; The Oceanica (D. C.) 144 Fed. 301, 305" (Ib. at 499).

"That a tow line properly secured will not slip off of the tow posts is a reasonable presumption, and evidence of damages resulting from the slipping of the tow line, unexplained, makes a prima facie case of negligence. The Quickstep, 9 Wall. 665, 19 L. Ed. 767; Cincinnati, etc. Ry Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; The Olympia, 61 Fed. 120, 9 C. C. A. 393; Memphis Electric Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453; The Sweepstakes, Fed Cases, No. 13,687; The Lyndhurst (D. C.) 129 Fed. 843; Burr v. Knickerbocker Steam Towage Co., 132 Fed. 248, 65 C. C. A. 554."

The S. C. Schenk, 158 Fed. at 57 (C. C. A. 6).

In a case where the *towing hawser of a tug broke,* resulting in loss of her tow, the Circuit Court of Appeals for the Second Circuit said:

"We concur with Judge Hand in the finding that *the storm was not of an unusual or extraordinary character. One might expect to encounter such a storm in that part of Long Island Sound at any time.* We also concur in his conclusion that the Standford was not of sufficient power to undertake to haul such a tow as this through the Sound with the chance of meeting such a storm. *The event shows this quite clearly."*

The Charles B. Sandford, 204 Fed. 77, 78 (C. C. A. 2).

"4. In not properly fastening the tow line. If the charges of fault were to be determined

solely by the expert testimony as to the mode of fastening adopted, it would have to be decided that the line was properly fastened, as far as the mode of fastening is concerned. But the question raised goes beyond the mere mode of fastening. Conceding the mode to have been correct, the real question is, was it properly and securely fastened according to that mode? *Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraordinary; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible prima facie in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug.*"

The Sweepstakes, 23 Fed. Cases, No. 13687, at pp. 542, 543 (D. C. Mich.).

"The petitioner urged that the barges were caused to break loose because the rise of the river was an extraordinary flood. This we cannot find to be the case. The river was high, *but not higher than it was likely to be, in the light of experience prior to that time.*"

Petition of Diamond Coal & Coke Co., 297 Fed. 238, at 241 (D. C. W. D. Pa.); Affirmed 297 Fed. 246; Cert. Den. 68 L. Ed. 721.

"While the burden of establishing negligence is primarily upon the plaintiffs, *when the fleet of barges went adrift the owner is presumptively negligent,* and liable to the injuries resulting. In other words, the burden shifts upon it. In The Louisiana, 70 U. S. (3 Wall.)

164-173 (18 L. Ed. 85), the Supreme Court said:

'The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, *unless she can show affirmatively* that the drifting was the result of inevitable accident, or a vis major, which human skill and precaution, and a proper display of nautical skill could not have prevented.' "

Petition of Diamond Coal & Coke Co., 297 Fed. 242, at 244 (D. C. W. D. Pa.); Affirmed 297 Fed. 246; Cert. Den. 68 L. Ed. 721.

"The claimants have failed to prove that the breaking of the rudder was an inevitable accident. The onus of proof rested on them; the libelants having, in the first instance, established a prima facie case either of neglect or of want of seaworthiness.

The law laid down in The Merchant Prince (1892), Prob. Div. 188, 7 Aspinall's Reports (New Series) 208, leaves no doubt on this point. This was an action for damages, by collision, in which it appeared that the plaintiff's vessel was at anchor in broad daylight in the Mersey, when the defendants' steamer ran into her. The defense was that the steam steering gear of the defendants' vessel failed to act, in consequence of some latent defect, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of defendants, and that the resulting damage was caused by inevitable accident. The steam steering gear in question was good of its kind. It had never previously failed to act, and the cause of the defect in the machine or in its working could not have been dis-

covered by competent persons. Part of the gear, including some portion of the chain, running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain was liable to stretch. It was also proved that, before the vessel left her anchorage and proceeded on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened as occasion required. It was held by the Court of Appeals, reversing the Admiralty Court, that the defendants were liable, as they had not discharged themselves of the burden cast upon them by the prima facie case. Lord Esher said (page 188):

> '*If he (the defendant) cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?*'

Lord Justice Fry said (page 189):

> '*The burden rests on the defendants to show inevitable accident.* To sustain that the defendants must do one or other of two things. They must either show *what was the cause of the accident, and show that the result of that cause was inevitable;* or they must show *all the possible causes* one or other of which produced the effect, and must *further show with regard to every one of these possible causes that the result could not have been avoided.* Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident.'

The Circuit Court of Appeals of this circuit has cited and quoted with approval from The Merchant Prince, supra, in The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552, and again in The Bayonne, 213 Fed. 216, 129 C. C. A. 560, where it was said by Judge Ward, de-

livering the opinion of the court, that the conclusion of inevitable accident,

*'should only be adopted if either the cause * * * is shown and that it was unavoidable, or else all possible causes must be shown to have been unavoidable.'*

If this is the law in collision and negligence cases, *there is equal, if not more, reason why it should obtain in the case of a towage contract, where there is an implied obligation of seaworthiness,* and where, as stated by Kennedy, L. J., in the Court of Appeal in The West Cock, (1911) Prob. Div. 208, on page 231, 12 Aspinall's Reports (N. S.) 57:

'The burden of proof * * * lies upon the tug owner to show that it was as reasonably fit and proper a tug for use as skill and care could make it.'

The court cannot, by approving a resort to mere conjecture as to the cause of the defect in the rudder, relax the important and salutary rule in respect of seaworthiness. The Edwin I. Morrison, 153 U. S. 215, 14 Sup. Ct. 823, 38 L. Ed. 688; The Alvena (D. C.) 74 Fed. 252, 255; The Phoenicia (D. C.) 90 Fed. 116, 119."

The Enterprise, 228 Fed. at 137, 138 (D. C. Conn.).

See also:

Great Lakes Co. v. Amer. Shipbuilding Co., 243 Fed. 852 (C. C. A. 6);

The Bertha F. Walker, 220 Fed. 667 (C. C. A. 2);

The Old Reliable, 262 Fed. 109 (C. C. A. 4).

"From the fact that a piece was found broken out of the tug's propeller it is argued that she must have struck a submerged log or other similar obstacle; *but there is no evidence*

on that point, and we cannot infer such an obstruction from the mere chipping of the propeller blade. Nor is there any evidence to show that a shock insufficient to materially injure the propeller should have broken a good shaft. We cannot concur with the finding of the court below that this case is an instance of inevitable accident. It is enough to refer to our judgment in Re Reichert Towing Line, 251 Fed. 214 (C. C. A.), decided since the decree appealed from was entered. The facts now before us are much less favorable to the tug than were those which we found insufficient in the decision just cited." * * * *"Here we infer negligence (i. e. unseaworthiness) in the tug from the unexplained breaking of her shaft."*

The Westchester, 254 Fed. at 577, 578 (C. C. A. 2).

See:

In Re Reichert Towing Co., supra.

"*The proof offered by the tugs did not afford any explanation of the causes of the disaster,* aside from the alleged disregard of orders by the tow. *No unforseen difficulties were encountered, and no obstacle which the tugs were not bound to anticipate.* The case is one where the stranding of the steamer created a presumption of negligence. The Webb, 14 Wall. 406, 20 L. Ed. 744; The Kalikaska, 107 Fed. 959, 17 C. C. A. 100."

The W. G. Mason, 142 Fed. at 915 (C. C. A. 2).

See also:

The Allegheny, 252 Fed. 8 (C. C. A. 3).

"The respondent having relied upon an inevitable accident, it was incumbent upon it to show *what the cause of the grounding was, and*

that the result of the cause was inevitable, in the sense that it occurred in spite of everything that nautical skill, care, and precaution could do (Mabey v. Atkins, 14 Wall. 204, 20 L. Ed. 881; The Morning Light, 2 Wall. 550; Union Steamship Co. v. N. Y. & Va. Steamship Co., 24 How. 307, 16 L. Ed. 699), or to show *all possible causes and as to all such that the result was inevitable* in the sense before mentioned (The Merchant Prince, L. R. Probate Division 179; The Olympia, 61 Fed. 120, 9 C. C. A. 293 (C. C. A. 6th Cir.); The Bayonne, 213 Fed. 216, 129 C. C. A. 560 (C. C. A. 2nd Cir.)).''

Gilchrist Tr. Co. v. Great Lakes Towing Co., 237 Fed. at 443 (D. C. N. J.).

''The following principles of law are well settled: * * * That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, *without the ship having encountered a peril sufficient to account for it, the presumption is that she was unseaworthy when she sailed.''*

Pacific Coast SS. Co. v. Bancroft Whitney Co., 94 Fed. 196 (C. C. A. 9).

''There must be responsibility lodged somewhere, and the corporation, in simple justice, must be held to as strict and full accountability as individuals. It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, *and damage ensues, without any apparent cause from stress of weather or collision in any way,* or undue or negligent abuse in handling and navigating her, *and in every such case the presumption obtains that she was unseaworthy at the time of entering upon her service.* How else could her condition be accounted for? In the case of The

Arctic Bird, (D. C.) 109 Fed. 167, the barge, the subject of libel, was taken in tow, having cargo on board, and, having proceeded for six hours on her voyage, sank without receiving injury from any known source, *and without encountering strong wind or rough sea. The court held it was to be presumed that the barge was unseaworthy at the outset; otherwise, there was no cause or way to account for her action in failing to perform the functions for which she was dispatched.* The court quotes, as authoritative, from Dupont De Nemours v. Vance, 19 How. 162, 15 L. Ed. 584, as follows:

> 'As to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak, and founders, soon after starting upon her voyage, *without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed.'*

And also from Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012:

> 'If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.' "

Oregon Lumber Co. v. Portland & Asiatic SS. Co., 162 Fed. at 920-921 (D. C. Ore.).

The Arctic Bird, 109 Fed. 167 (D. C. Cal., DeHaven, J.).

A passenger was injured by a steamer running into a dock through the refusal of her port reversing engine to act. The court said:

> *"It was not for the plaintiffs to furnish a theory that would account for the accident, but for the defendant to show that it came from*

something which could not reasonably have been prevented. Even if there was nothing to contradict the evidence produced by the company to show that it had performed its duty, it would still have been for the jury to say whether they were satisfied with it; and there can be no just cause for complaint if they have rejected some of the facts testified to, and given a significance to others which fails to exonerate the company, provided only that it is consistent and warranted."

Walker v. Wilmington Steamboat Co., 117 Fed., at 786;

Director General v. Frasse, 1924 A. M. C. 354 (stevedore damaging barge).

"The facts upon which liability depends are simple in the extreme. The Rambler's boiler blew up, although of good, if not superior, make, shortly after satisfactory inspection, and while in charge of duly licensed men. *By the contention of the petitioner, no reason is shown for the explosion. We have no doubt that these facts present a clear case for applying the rule commonly spoken of as that of 'res ipsa loquitur'.* Of the nature and effect of this rule we have nothing to add to what we said in Central Railroad v. Peluso, 286 Fed. 661. But since this is a case of a boiler explosion on shipboard, we refer to the opinion of Wallace, J., in Rose v. Stevens etc. Co., (C. C.) 11 Fed. 438. There a jury was instructed that they might infer negligence from the fact of the explosion; i. e., the explosion spoke for itself."

The Rambler, 290 Fed. at 792.

In accord (exploding boilers): DeHaven, D. J., *Re Cal. Nav. & Imp. Co.,* 110 Fed. at 672 (N. D. Cal.).

The Omar D. Conger, 1 (2nd) Fed. 732; 1924 A. M. C. 1576.

A steamer struck, with considerable force, a wharf at which she was landing, and injured plaintiff, who was standing thereon. The Supreme Court said, in sustaining an instruction to the jury:

> "The whole effect of the instruction in question, as applied to the case before the jury, was that, *if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be prima facie evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this prima facie evidence was rebutted.* As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case *was prima facie, and, if unexplained, sufficient evidence of negligence on their part,* and the jury might properly be so instructed."
>
> *Inland and Seaboard Coasting Co. v. Tolson,* 139 U. S. 555; 35 L. Ed. at 271.

See also:

Gleeson v. Va. Midland Ry. Co., 140 U. S. 442; 35 L. Ed. 462.

> "He (the carrier) is responsible for injuries received by passengers in the course of their

transportation which might have been avoided or guarded against by the exercise upon his part *of extraordinary vigilence, aided by the highest skill. And this caution and vigilence must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages.''*

Penn. Co. v. Roy, 102 U. S. 456; 26 L. Ed. at 144.

Accord:

Northern Commercial Co. v. Nestor, 138 Fed. 386 (C. C. A. 9th).

(b) The Evidence Does Not Rebut, But Confirms The Case Res Ipsa Loquitur.

The evidence offered by petitioner, even without regard to that offered by claimants, so far from *overcoming* the case *res ipsa loquitur, absolutely confirms and seals it.*

The master of the ''Three Sisters'' found the bridle aboard her when he took the barge *up* to Point Reyes a month before the *down* trip on which claimants were injured, and didn't know anything about where it came from (Cap. Kruger, 76, 77). It appears the bridle remained on the ''Three Sisters'' and *was used for other towing* between the

up and down trips (Cap. Kruger, 81, 105, 112, 113). When not in use the master said that it was in the hold of the "Three Sisters" (Cap. Kruger, 81).

Asked if the swivel was working when made fast to the barge for the down trip *on which the men were injured,* the master said:

"I could not say, *for I didn't look at it*" (Cap. Kruger, 92, 112). Before he made the up trip he made no investigation of the swivel and didn't know whether it would work (Cap. Kruger, 112).

> "Q. And you don't know right now whether or not at that time or at any subsequent time the swivel was rusted so bad that it would not turn, do you?
> A. *No sir*" (112).

His testimony on direct examination that "it must have been working" (78) is obviously not from actual memory. *It is the conclusion of a naturally biased witness based upon imagination and inference.* This is confirmed by the *deposition* of Urquhart, an experienced ship rigger (Carlsen 431) who helped put the bridle over the barge's bitts at Point Reyes on the voyage on which the men were hurt (Dep. 49) as to its condition *at that time:*

> "A. The wire was quite rusty as if it had been used for a long time or been lying around like it was old. The swivel in the center where the tow line shackled into was not in good working order.
> Q. What was wrong with the swivel?
> A. *It was rusted fast or frozen so that it would not turn.*

Q. Have you had any experience in the use of ropes and bridles during your occupation as pile driver?

A. *I have been a ship rigger and certainly made lots of bridles and lots of wire in my time.*

Q. From your observation, Mr. Urquhart, was or was not this bridle a fit and proper bridle to be used in the condition that it was?

A. *It was not to my idea.*

Q. What effect, if any, Mr. Urquhart, has the fact that the swivel in the bridle being frozen or rusted have upon the likelihood of this bridle to break when being used for towing?

A. When the tow line becomes taut the turns will run out of the rope and the swivel being frozen and rusted solid the turns would have to go into the wire as there is no place else for them to go; so the wire would lay up one part on the other like a rope.

Q. And would that condition have a tendency to cause the bridle to snap or break?

A. *It certainly would;* chafing up like that, the laying and unlaying would wear it out in a short time and weaken it so as to cause it to break" (Urquhart Dep., 46, 47).

And as to its condition a month earlier, at the beginning of the *up trip:*

"Q. When did you *first* observe the condition of the bridle upon the barge?

A. The *first* time when it was put on the barge to be towed to Point Reyes. The barge left Pier 46" (Dep. 48).

"Q. And you would say that at the *first* time that you examined this bridle that *it was frozen in the swivel?*

A. *It was.*

Q. Rusted fast?

A. At the time we put it on at Pier 46 the two parts of the bridle spliced into the swivel was *twisted up between two and three feet.*

Q. Did I understand you to say that at the time you *first* observed this bridle at Pier 46 that the swivel of the bridle was *so rusted and frozen that the swivel would not turn?*

A. *Yes.*

Q. That was the condition of the bridle at that time?

A. That was the condition of the bridle and before putting the eyes over the bitt we took the turns out of the wire so that both parts of the bridle were clear.

Q. But the swivel at that time was frozen?

A. *It was''* (Urquhart Dep., Cross-Exam., 48, 49).

"Q. Was the entire bridle in a rusted condition on this occasion when you first observed it?

A. It was some rusted throughout.

Q. Did you observe any oil on the bridle?

A. No.

Q. Did you observe any oil upon the swivel of the bridle?

A. *Not a bit.*

Q. Did you ever *again* observe the bridle after this observation of it which you have *just testified to?*

A. I helped put the bridle on the barge to be towed *from* Point Reyes *to* San Francisco'' (Urquhart Dep., Cross-Exam., 49).

He plainly testified on direct examination that the swivel was frozen and the cable rusty when the voyage *from Point Reyes* began (Dep. 46, 47, quoted supra). In cross-examination petitioner's proctors asked him when he *first* observed the condition of the bridle, and he answered what they asked him.

Proctors for petitioner, for reasons of their own, did not pursue their cross-examination *as to the condition at Point Reyes* at the commencement of the *down* trip, further than to ask the above quoted question:

> "Q. Did you ever *again* observe the bridle *after* this observation of it which you have *just* testified to?
>
> A. I helped put the bridle on the barge to be towed *from* Point Reyes *to* San Francisco" (Urquhart Dep., Cross-Exam., 49 supra).

Claimants' witness Reid, *who placed the bridle over one* bitt of the barge at the beginning of the voyage down, testified that the bridle looked rusty and *some of its strands were broken* (Reid, 365, 366, 371, 372, 373, 380, 381; Figari, 249). It is respectfully submitted that the Court was under some misapprehension in its remark on pages 380, 381 of the record, for the *petitioner offered no evidence at all* to the points on the bridle where the two breaks occurred, and claimants' testimony on the point consisted of that of Haney and Reid, who are *entirely consistent* that one break was near one of the large bitts and the other:

> "A. About a foot or so from the swivel, there" (Reid, 372, 373).
>
> "A. It broke back of the splice" (Haney, 258, 259).

The master of the "Three Sisters" not only made no inspection at the beginning of the *down trip,* as pointed out above, but he made none at the beginning of the *up trip:*

"Q. And you didn't make any investigation at that time of the swivel, did you?

A. *No sir.*

Q. You didn't know whether or not that swivel would work, did you?

A. *No sir.*

Q. And you don't know right now whether of not at that time or any subsequent time that swivel was rusted *so bad that it would not turn,* do you?

A. *No sir.*

Q. Captain Kruger, will you swear now you examined the bolt of the swivel you used, and that you know it was galvanized?

A. *I didn't examine it"* (Cap. Kruger, 112, 281).

Nor did he make any inspection of it *even after the bridle had broken in two places:*

"The COURT. Q. Did you look at the bridle when you hauled it aboard?

A. *No,* Judge" (Cap. Kruger, 146).

The single deck hand of the "Three Sisters" made no inspection of the swivel:

"Q. At that time did you notice whether the swivel was turning freely in its socket?

A. *No, I didn't notice the swivel at all"* (Anderson, 166).

Thus the testimony shows without contradiction that neither the master nor the single deck hand *ever examined the swivel,* and it does not show that either of them *ever examined the bridle,* either before or after the bridle broke in two places. And yet, *petitioner's own expert* Mohr testified:

"Q. Before you make a tow, Captain, you always examine your swivel, don't you, *to see whether or not it is in working order?*

A. *Yes.*

Q. You would not use a swivel which was frozen or rusted up fast, would you?

A. *A swivel that is frozen or rusted up, I always try to put it back in function"* (Mohr 399, 400).

And the master himself admitted that in towing with a bridle a swivel is necessary—and, of course, that means a *working* swivel:

"Yes, if you have a bridle *you have to have a swivel"* (Cap. Kruger, 119).

The situation cannot be more aptly summarized than in the words of Mayer, Circuit Judge:

"We are satisfied from the testimony that the Mercer was not guilty of any fault in her navigation in or about the Baltimore & Ohio bridge, *but that the approximate cause of the accident was the rotten condition of the Mamie Nelson's lines. It is plain that these lines for practical purposes were useless, when subjected to a strain of any consequence.*

There is no evidence that the master or any one else on the Mercer made either inspection or inquiry concerning the lines when the tow was made up or at any time thereafter. The pilot was not called, nor does the record disclose any explanation of his absence.

It must be concluded from the testimony that the Mercer thus *started off with this tow without even the slightest investigation by her master or pilot as to the lines of the barge Mamie Nelson,* and we think the testimony shows that even a slight investigation would have dis-

closed the unfit condition of the lines. Indeed, Weber testified that after the occurrence, he told the captain of the Mamie Nelson 'that his lines were rotten and were not fit to tow with,' and that the captain answered, 'They were the best he had; that the boss would not give him any better.'

In these circumstances, the Director General is liable as well as the Central Co. The Quickstep, 9 Wall. 665, 19 L. Ed. 767.

In The Sunnyside, 251 Fed. 271, 163 C. C. A. 427, the facts are quite different from those in the case at bar. *In that case, the lines were examined,* and the court held that the examination was reasonable, but the defect was not readily discoverable because the lines were unsound at the core."

The Mamie Nelson (Robitzek & Davis), 296 Fed. 107, at 108, 109; 1924 A. M. C. 713 C. C. A. 2);

Scow H. S. Hayward, 1924 A. M. C. 242 (D. C. N. Y.);

Tugs Osceola & Hercules, 1924 A. M. C. 1030 (D. C. N. Y.).

Mr. Figari, *the General Superintendent of Crowley Launch and Tugboat Co.* (156), of whom Mr. Brown, of Healy Tibbitts Construction Co., borrowed the bridle for the Paladini Company, (174, 175) did not inspect the swivel or the bridle before they were delivered to Paladini:

"Q. You don't know anything now of your own knowledge about this particular swivel that you let Mr. Brown have, do you?

A. *No.* The only thing I know is that it was used on the boat.

Q. And you have never seen that swivel since, have you?

A. *I have not seen it since"* (Figari, 160).

"Q. And you did not do anything to that swivel before you put it on the dock before it was delivered to the barge, did you?

A. I got the *captain of our tug* to take it off his boat, cut the manila line out and just throw the bridle on the dock.

Q. You didn't touch that bridle at all yourself, you had the captain throw it on the dock?

A. I told him to take it off. *I just looked at it.* I told him to cut the line and put it on the dock" (Figari, 160, 248, 249).

Mr. Figari also testified:

"Q. Who inspects your (Crowley L. & L. Co.) equipment?

A. The *captains* of the tugs inspect their own equipment" (Figari, 160, 248).

It is significant that the *captain of the tug* from which the bridle was taken *was not called* to testify as to the condition of the bridle or swivel, their age, use to which they had been subjected, etc.

It is also most significant that Mr. Figari also testified that the company *of which he was the General Superintendent* and from which the bridle in question was borrowed, *did no outside towing:*

"We don't do any outside towing; most all our towing is in the bay. We have towed a barge like that up to Point Reyes, and we used the same kind of a bridle. We do very little outside towing. *If we do go outside it may be just outside the Gate; and we might have a barge of rubbish, or something like that to tow out. We do very little outside towing, it is all*

in the bay" (Figari, 163; Heidelberg, 426; Carlsen, 301).

Mr. Carlton, one-time Port Engineer for the petitioner (though to what time neither he, Davis, who succeeded him, nor Paladini would say), says he *saw* the bridle a month before, "the morning of the tow" *to* Point Reyes, but did not examine it:

> "Q. Did you see the bridle that was used by the 'Three Sisters' to tow the barge up to Point Reyes?
>
> A. The *only* time I saw the bridle was *on the barge* at Pier 23, the next morning. *I never went on board, and* I had nothing to do with it" (Carlton, Direct Exam., 354).
>
> "Q. Did you examine the swivel that day carefully?
>
> A. *I just looked at it.*
>
> Q. How far away from it were you when you looked at it?
>
> A. About two feet" (Carlton, 358).

His testimony on further direct examination that the swivel was not frozen and was turning (355) is but another plain example of *imagination and inference turned into recollection by a naturally biased witness* protecting himself against imputation of negligence in his duty.

It is not contended that petitioner's witnesses (Horten, 127-136; Westman, 151, 162; A. Paladini, 231; Crowley, 245, 246, or Mohr, 392-419) made any examination of the bridle or swivel, or that Brown, (175, 176), or Del Savaro, (131, 239, 240), did so.

It remains only to examine the testimony of Mr. Davis, (176-222), who says that he was Port Engineer for the petitioner, though, as above remarked, neither he nor his predecessor nor Mr. A. Paladini disclosed when he succeeded Carlton (Davis, 176-177, 186, 191, 192, 197, 198, 205, 212, 220; Carlton, 356, 357, 360, 361, 362; A. Paladini, 235, 225, 226; Kruger, 70, 74, 111). It is respectfully submitted that *the testimony of Mr. Davis himself shows that he never examined either the bridle or swivel.* No insinuation is necessarily cast against the honesty of a biased witness by making some allowance for error or defect in his memory. We ask the court to carefully read the testimony of Mr. Davis upon this point, bearing in mind the statement of Mr. Justice Field:

> "Our memories are easy and ofttimes unconscious slaves to our wills".
>
> *United States v. Flint,* 25 Fed. Cas. No. 15,121, at page 1111.

Judge Finch said:

> *"The interest of a perfectly credible and innocent witness may, and often does, color his recollection and mold and modify his statements, sometimes even insensibly to himself".*
>
> *Hunter v. Wetsell,* 84 N. Y. 549, at 556.

Bearing in mind, also, the natural bias in his own interest, the language of District Judge Kane is peculiarly applicable to his testimony:

> *"It could scarcely be expected that the look-out man should attest his own want of viligence, and it is not to make a serious imputation against him to admit that he cannot now recall with unbiased accuracy the collateral incidents of a catastrophe to which he was at least a painfully interested witness, if not a responsible party".*
>
> *Sanderson v. The Columbus,* 21 Fed. Cas. No. 12,299.

We respectfully submit that Mr. Davis did not testify from any actual memory which he had of examining the bridle or the swivel, but from his imagination and inference turned into recollection. *We ask the court to read his testimony with this in mind.* The psychology of the matter was well expressed by Sir John Romilly:

> "In the examination of the evidence of witnesses great difficulties of various sorts arise, and dangers with which the court has constantly to deal in examining the evidence of witnesses who are perfectly honest and give their evidence perfectly bona fide, *arises from their turning inference into recollection".*
>
> *Pierce v. Brady,* 23 Beav. 64, 70.

> "It is a very common thing for an honest witness to confuse his recollection of what he actually observed, with what he has persuaded himself to have happened, from impressions and conclusions not really drawn from his own actual knowledge".
>
> *Matter of Wool,* 36 Mich. 299, 302.

It seems perfectly obvious that Davis had no recollection of having made any examination of the bridle, the swivel or even the rope hawser, *but merely inferred from the fact that he was supposed to examine petitioner's vessels that he must have made an examination in the particular instance.* His very language shows this, and if such an inference could ever be relevant or competent, it could not be so or have any weight in this instance, because *Davis had not been petitioner's port engineer long enough* to have established a custom of making such examinations. Attention must again be directed to the unsatisfactory state in which petitioner left the record with respect to when Davis succeeded Carlton as petitioner's port engineer, which cannot but confirm the fact that the obligation of examining the bridle and swivel *fell between the two and was never performed by either.* Though we request the court to read *the whole* of the testimony of Davis, we quote from it as follows, the more clearly to demonstrate that he had no recollection of making any examination.

It is to be noted that Mr. Davis admitted that it was his duty to inspect the tow line, showing his biased interest:

> "Q. Whose duty was it to see that this tow line was good and sufficient?
>
> A. *My duty*" (183).
>
> "Q. Mr. Davis, do you now say you remember having examined this bridle in June of

1923, this particular bridle that was used in towing Barge 61 back from Point Reyes?

A. I examined all equipment" (189).

"Q. What did you do in examining the bridle and swivel; just tell us what you did?

A. Well, *I can't remember that far back but I know I did examine it.*

Q. Yet you don't remember what day you examined it?

A. Exactly, personally, *no*" (190, 191).

"Q. Where did you find this swivel? Where was it when you examined it?

A. *I don't remember exactly*" (192).

"Q. What did you do with the swivel and the bridle after you got through examining them?

A. I didn't do anything with it.

Q. You must have done something with it. You either let it lay on the wharf, or you did something with it, didn't you, after you got through examining it? Have you answered the question?

A. *I don't remember*" (193).

"Q. What was the condition of that wire rope as to whether or not it was rusted?

A. Well, I don't think it was rusted, *because if it had been I would have noticed it*" (193, 194).

"Q. Was there any oil on the swivel?

A. *I don't remember.*

Q. You don't remember that, whether there was any oil on the swivel or not?

A. There *probably* wasn't.

Q. There probably wasn't; but you don't know now of your own knowledge. You don't know of your own knowledge that there was no oil on it?

A. *No.*

Q. You didn't put any oil on it, did you?

A. I did not.

Q. Wasn't that swivel some rusted?

A. *Probably* it was colored, but not rusted" (194).

"Q. Did you, Mr. Davis, personally examine the pin in that swivel?

A. I examined the swivel.

Q. You examined the pin in the swivel and you say that it was not rusted at all?

A. I would say that it was not rusted.

Q. It would turn freely?

A. Yes.

Q. And you don't remember what you did with it after you examined it?

A. *No. I probably* let it lay where I examined it.

Q. Well, how do you know, then, if you let it lay where you examined it, that it was the swivel that was used by the 'Three Sisters' in towing the barge down—the swivel and the bridle?

A. How is that?

Q. If you let this lay on the wharf, how do you know it was the particular swivel of the bridle that was used in this tow on June 8, 1923?

A. *I have no means of knowing.*

The Court. Q. At what wharf was it when you examined it?

A. 23.

Q. Did you have any other bridle there?

A. *Not that I know of.*

M. Heidelberg. Where did you get this swivel?

A. I didn't get the swivel.

Q. I mean the day that you examined it, where did you get it?

A. I didn't get it.

Q. Where did you find it when you examined it; did you find it on the wharf?

A. *I would not say exactly.*

Q. Don't you remember whether you went aboard the boat and brought it out or whether somebody placed it on the wharf for you to examine?

A. *I do not.*

Q. You don't remember where you examined, do you?

A. On Pier 23 or on the boat, *probably.*

Q. You remember you examined the *rope* on the pier, don't you?

A. Yes.

Q. Or did you examine the rope on the pier?

A. Yes, I examined the *rope* on the pier.

Q. But you don't remember whether you examined the *swivel* on the boat or on the wharf?

A. *I do not"* (194, 195, 196).

The witness knew nothing of the use of the rope and swivel in the interim between the time when the barge was towed to Point Reyes and the time of the down trip from there, but testified that he *thought it was on Pier 23* during that time (195, 196). This was contrary to the testimony of Captain Kruger that it was *on the "Three Sisters"* during that time. He does not remember whether he put the tow line on the "Three Sisters" or whether he went aboard of her and got it (195). He was entirely unable to fix the time when he says he examined the swivel, either with reference to the day of the month or day of the year, or with reference to the date the accident happened. It is true that in answer to the court's question, "Did

you examine the bridle just before she went out on that last trip to bring back the barge?" the witness answered "Yes" (197). *It is submitted with deference that the witness thought this was the proper answer to give to the court's question, for his testimony as a whole shows that he had not the slightest recollection of examining the bridle, much less of when.* The witness did not know that the swivel had been *in the hold of the "Three Sisters" since the up trip,* though Captain Kruger testified that such was the fact; he did not get the swivel from the hold at the time he says he examined it, and says that he does not remember seeing anyone else get it from the hold (198, 199).

"Q. Where did you find the swivel?

A. *I don't remember.*

Q. And yet you do remember that you examined it?

A. Yes.

Q. And you examined it minutely, carefully?

A. *That is my business.*

Q. Answer my question. I say do you now remember that you did examine this particular swivel on or about the 5th day of June, 1923, very carefully?

A. I remember of examining the tow line, the bridle (199).

Q. Where did you find the bridle?

A. *I don't remember where I found the bridle.*

Q. Was the bridle connected with the swivel when you found it?

A. Was the bridle connected with the swivel?
Q. Yes?
A. *It probably was.*
Q. It probably was; I am asking you was it?
A. Yes" (199, 200).

"Q. What kind of an outfit was this particular swivel?
A. *Exactly, I don't remember"* (200).

"Q. I believe you testified, Mr. Davis, that you did not know what you did with this swivel after you made your examination of it?
A. *I don't remember what I did with it.*
Q. Then I ask you again, how it is that you know that the swivel you examined was the swivel which was used in the tow from Point Reyes down here on the 8th day of June, 1923. You don't know that it was, do you?
A. *Well, I have no proof for it.*
Q. Did you ever see that swivel afterwards?
A. *I did not.*
Q. What happened to that tow rope when the 'Three Sisters' brought it in; did you ever see that afterwards?
A. Yes, that tow rope was put on the dock.
Q. When; I mean in relation to the accident, when was it?
A. *I don't remember just when.*
The COURT. It must have had the swivel attached to it.
Mr. HEIDELBERG. That is just what I am getting at, may it please the Court.
Q. When was that put on the dock?
A. *I don't remember.*
Q. You don't remember even whether it was in the month of June, or not, do you?
A. It might have been.
Q. You didn't make any other examinations of that rope during the month of June, did you?
A. Not that I know of.
Q. Did you ever see that rope after June 8, 1923?

A. Yes, sir.

Q. You don't remember when, though?

A. Yes, we had rough weather one night, and I went down and tied up the boats.

Q. And you used the tow rope to tie up the boats?

A. I did.

Q. And at that time it didn't have the parts of the bridle attached to it, yet, did it?

A. *I think not.*

Q. As port engineer, didn't you ask what had happened to that bridle when the 'Three Sisters' came in?

A. *I don't remember.*

Q. You don't remember whether you asked that, or not?

A. *No.*

Q. Didn't you ask what had happened to the swivel?

A. *No.*

Q. Didn't you know you had borrowed that swivel and bridle from Crowley's, and that you had to return it?

A. I never borrowed it'' (203, 204, 205).

''Q. You never saw the parts of the bridle that were attached to the bitts on the barge after the accident, did you?

A. *I did not.*

Q. Didn't you make any inquiry about it?

A. *I don't remember.*

Q. You were in charge of the equipment of A. Paladini Inc. at that time, were you not?

A. *I was.*

Q. Did you not deem it your duty to make inquiry as to what had happened to the bridle on that boat?

Mr. Lillick. That is objectionable, your Honor, what he deemed to be his duty is not pertinent here.

The Court. Let him answer it.

A. *Well, I don't remember whether I did inquire, or not.*

Mr. HEIDELBERG. Q. Didn't Crowley make a demand on you later for the production of that bridle and the swivel?

A. *I believe he did some time later*" (205, 206).

"Q. Did you go aboard the 'Three Sisters' that night?

A. I did.

Q. Did you make an examination of the towing apparatus there on that boat that night?

A. *I did not.*

Q. You knew that owing to the breaking of this towing apparatus there had been a serious accident, did you not?

A. *I did.*

Q. You were in charge of the equipment for A. Paladini, were you not?

A. *I was.*

Q. And you say you made an inspection of that equipment three or four days prior to that time, did you not?

A. I did.

Q. Were you not somewhat interested in finding out how the equipment had broken?

A. At that time I was interested in getting the barge back, sending a towboat out after her" (208).

"Q. And you didn't ask Captain Kruger anything about how the accident happened?

A. Not at that time.

Q. And you didn't make any inspection of the apparatus, at all?

A. Yes, sir.

Q. What did you inspect?

A. *I went down in the engine-room and looked over the engine.*

Q. I mean of the towing apparatus, in particular.

A. *I never inspected the towing apparatus.*

Q. And yet you knew there had been an accident by reason of the breaking of that towing apparatus?

A. Someone telephoned to me.

Q. And you knew it when you got aboard the 'Three Sisters' didn't you?

A. *Yes, sir*" (210, 211).

"Mr. Lillick. Q. When you saw the bridle that was taken by the 'Three Sisters' when she went up to bring the barge back, did A. Paladini, Inc. have any other bridle?

A. No, sir, *not that I know of.*

Q. This was a borrowed bridle?

A. *So I understand.*

Q. And the bridle that you did inspect that you have testified to was the only bridle that A. Paladini, Inc. had down at the dock at that time, was it?

A. It was the only one *I know of*" (217).

It will be noted that petitioner did have another bridle at the time of the trial (202, 203, 207, 218, 219, 220, 221, 222, 250).

"Q. Now let me ask you if it is not a fact that you did not make a minute and careful examination of that other swivel?

A. I am sure that I did.

Q. But you now give it as your testimony that the only difference between that swivel and this swivel is the fact that that swivel was probably a larger swivel than this, and that it had a thimble instead of the shackle?

A. *As far as I know.*

Q. As far as you know. You looked at both of them. You inspected the other one, didn't you?

A. *But that has been a long time ago.*

Q. But you thoroughly inspected it at that time, and you knew the exact condition of it, didn't you?

A. The other one was standard construction'' (222).

If the court should believe that Mr. Davis did make any inspection of the bridle or swivel, it cannot but be satisfied that such inspection was purely casual. The language of Judge Wolverton in *denying limitation of liability* for the sinking of a vessel in ordinary weather is peculiarly applicable:

> "The O'Reillys were the manager and superintendent, respectively, of the libelant. They have testified fully as to their knowledge of the condition of the barge at the time of the demise. They show that each of them was in the hold of the barge from time to time, one of them only a short time before she was given into the charge of the Portland & Asiatic Company, and made observations as to her condition. But it is clear that neither of them made any critical or careful examination at any time, with proper lights to aid them in determining her condition. Neither of them would say with persuasion that the keelson was not broken, as asserted by Seaman, or that the other conditions as portrayed by the latter did not exist.''

Oregon Lumber Co. v. Portland & Asiatic SS. Co., 162 Fed. at 922 (D. C. Ore.);

McGill v. Michigan S. S. Co., 144 Fed. 795 (C. C. A. 9), quoted infra.

In the present instance it stands admitted that no one on behalf of petitioner examined the cable or swivel at Point Reyes before the beginning of the

voyage on which the men were injured, her master and only deckhand testified that they did not do so. The record shows, without contradiction, that Davis himself was at Point Reyes on the day before the "Three Sisters" left for San Francisco on the voyage in question (Carlsen, 291, 292) but he made no examination there. The vague and inferential testimony of Davis that he made an examination before the vessel left San Francisco is positively contradicted by the testimony of Urquhart, above quoted, that the swivel was frozen and the bridle rusty, both at the beginning of the voyage from San Francisco with the barge, and at the beginning of the voyage from Point Reyes. As has been pointed out, Davis was a naturally biased witness. *Urquhart was a disinterested witness,* and an *actor* with respect to the cable and swivel, since he placed it over the bitts on the barge on both trips, having actually had to untwist the legs of the cable which were twisted together near the swivel. It will also be noted that Urquhart's deposition was the first testimony taken in the case, and was taken months before Davis testified.

As has been before remarked, *the petitioner did not produce at the trial any part of the bridle, nor the thimble, nor the swivel.* Its only explanation for the non-production of them was that the petitioner did not know that claimants would make claim against petitioner and that petitioner was not immediately advised that claimants would do so.

Mr. A. Paladini first testified that it was "six or eight months" after the injury before he knew that claim would be made (240). He later testified that Mr. McShane first called on him about "three months after the accident" (426, 427). Mr. McShane, one of the attorneys for claimant, testified that he saw petitioner not more than a week after claimant Carlsen's visit to him (432, 433, 434, 435), and Carlsen testified that it was not more than five weeks after he was injured that he visited Mr. McShane (437), showing that petitioner knew *six weeks* after the accident that claims would be made. Mr. McShane positively testified, contrary to A. Paladini, that he did not mention anything about compensation insurance (435); but even if he had done so it would have afforded no excuse for the non-production of the physical evidence. Moreover, corporations of the magnitude of A. Paladini, Inc., are accustomed to scenting claims even though they do not in fact materialize. Even could the failure to produce any part of the broken bridle be overlooked, failure to produce or account for the swivel and the thimbles attached to it must persist. The evidence shows that, *although borrowed from Crowley Launch and Tugboat Co., neither swivel or thimbles or any part of the bridle were returned, and that compensation was made for the loss.* If the swivel was a proper swivel *it most certainly would not have been thrown away.* The failure to produce, in conjunction with the failure of the master and deckhand of the "Three Sisters" to

make any examination of such tackle at any time, in view of the positive testimony of Urquhart, and the unescapable fact that the bridle *did in fact break in two distinct places,* not only discredits the testimony of Davis, but absolutely fixes a liability upon petitioner against which it is not entitled to limit.

As the court knows, the highest proof of which any fact is susceptible is that which presents itself to the senses of the court. *Neglect to produce such evidence by a party who had it in his power justifies the inference that it would operate to the prejudice of his contention.* The following instances of the effect of the non-production of demonstrative evidence in admiralty cases are instructive:

> "The bare production of the rope would have demonstrated the theory of respondent. He had full notice of its importance, and opportunity to produce it. The rope was not produced. Why? It is difficult, if not impossible, to escape the conclusion that the rope was not produced because its production would have contradicted the theory of the defense. As a matter of fact I find that the sling which parted was an old one. This being the case, was the ship responsible? The wear and tear in use of these slings is very great."
>
> *The Phoenix*, 34 Fed. 760, at 762 (D. C. So. Car.).

> "It is claimed, on behalf of the appellee, that the lines were in good condition and practically new. There is no dispute as to this and as to the condition of the lines at the point where they parted. The lines were not produced, and

inspection therefore not afforded to ascertain whether they parted from strain or from being defective or insufficient. The failure to preserve the lines and produce them would justify the inference that, if produced, they would have shown the results of the strain due to the slipping of the barge as it came off the shoal. The Colon, 249 Fed. 462, 161 C. C. A. 418; The Bertha F. Walker, 220 Fed. 667, 136 C. C. A. 309" (District Court decree reversed).

Clyde Lighterage Co. v. Penn. Ry. Co., 258 Fed. 116, at 118 (C. C. A. 2).

"One of the stevedores marked the cover when it was examined the next morning. The failure of the claimant to preserve it and to produce the measurements taken by the ship's carpenter and written down by the superintending engineer that morning, justifies the inference that the cover and the measurements, if produced, would have shown defective equipment. The Phoenix (D. C.) 34 Fed. 760, 762; The Lackawanna, 210 Fed. 262, 127 C. C. A. 80; The Bertha F. Walker, 220 Fed. 262, 136 C. C. A. 309."

The Colon, 249 Fed. 460, at 462 (C. C. A. 2);

The Bolton Castle, 250 Fed. 403, at 404, 405 (C. C. A. 1); (swivel produced but not block);

The Dunnoly, 1924 A. M. C. 1572 (buckled mast);

The Luckenbach, 144 Fed. 980 (D. C. Va.) (broken rope);

The Brittania, 148 Fed. 498, at 499 (D. C. Va.) (broken hawser);

The S. S. Pereire, 19 Fed. Cas. No. 10,979, at p. 226 (D. C. N. Y.) (damaged cases).

It is to be noted in the instant case that petitioner did not offer a word of testimony as to the *age* of the bridle or swivel, the *period during which they had been used,* or the *character of the use* to which they had been subjected. It does appear, however, that it had been "exposed to causes which might have affected its strength" (*The Brittania,* supra).

How far petitioner came from complying with the requirements laid down by the courts for the proof of inevitable accident is apparent; *for petitioner neither showed,* (1) *what was the cause of the accident and that the result of that cause was inevitable, nor did it show,* (2) *all the possible causes, one or other of which produced the effect, and then, with regard to every one of such possible causes, that the result could not have been avoided* (see *The Enterprise,* quoted supra). Indeed, what more frank confession of the total failure to establish inevitable accident than the very questions of petitioner's proctors to their expert, Mohr, on pages 397 and 398 of the record.

2. Petitioner and Its Servants Were Negligent in Divers Other Respects.

The respects in which petitioner was negligent have been covered, for the most part, by what has already been said under heading 1, subdivisions (a), (a′), (a″) and ("b"). The case *res ipsa loquitur* demonstrates that the bridle and swivel used to tow the barge was defective and/or that petitioner's servants were negligent in handling the tow. Attention

will merely be recalled to the particulars of negligence already covered; then ("g" infra) the plain negligence of petitioner's master in failing to warn the injured claimants away from the hawser and in failing to see such warning was observed will be demonstrated.

(a) Neither Master Nor Deckhand Of The "Three Sisters" Ever Inspected The Towing Equipment (Assignment of Errors XII, XVIII, 483, 484).

(Covered supra.)

(b) No One Inspected The Towing Equipment At Point Reyes Before The Commencement Of The Voyage On Which The Injuries Were Sustained (Assignment of Errors XII, XIX, 483, 485).

(Covered supra.)

(c) No One Inspected The Towing Equipment Before The Commencement Of The Voyage To Point Reyes (Assignment of Errors XII, XX, 483, 485).

(Covered supra.)

(d) The Master Of The "Three Sisters" Did Not Manipulate His Engines Or Vary His Towline To Keep The Tow Safe (Assignment of Errors XXII, 485).

(He did not change the speed of his engines: 124, 170, 402, 415; and did not reverse when he saw the first break in the bridle: 96; and did not vary the length of his towline: 172, 402, 415: see: Tugs Osceola & Hercules, 1924 A. M. C. 1030.)

(e) The Master Of The "Three Sisters" Towed With Too Short A Towline (Assignment of Errors XXII, 485).

(See: Carlsen, 295, 296, 302, 303; Haney, 255, 259, 265; Reid, 368, 369, 383, 384; Evans, 343.)

(f) Neither Port Captain Carlton Nor Port Captain Davis Nor Captain Kruger Nor Deckhand Andersen Were Competent To Fill Their Respective Positions (Assignment of Errors, XXI, 485).

(Covered supra: Their own conduct demonstrated the fact—McGill v. Michigan S. S. Co., 144 Fed. 788 at 795, C. C. A. 9; The Cygnet, 126 Fed. 742 (C. C. A. 1), quoted infra.)

(g) The Master Of The "Three Sisters" Was Negligent In Failing To Order Injured Claimants Away From The Hawser And In Not Enforcing Such Order; Injured Claimants Were Not Contributorily Negligent (Assignment of Errors XXIII, XXIV, XXV, 485, 486).

(Note: Contributory negligence in admiralty divides damages proportionately to negligence.)

The petition asserts that the injured claimants were guilty of negligence in being on the after deck of the "Three Sisters", about four feet to one side of the hawser, seated on the deck playing cards (Petition, 9). *There is no support in the record for the statement in the lower court's opinion* that

> "It is not, however, denied that it was a dangerous place, for the reason that the experience of all seafaring men has shown that the vicinity of where a hawser is fastened, when the vessel has another vessel in tow, is a dangerous place" (Opinion, 472; Assignments of Error XXIII, XXIV, XXV).

It is denied that it was a dangerous place (Answers 17, 18; 37, 38) and there is no evidence whatever that the "experience of all seafaring men" has

shown it to be so. *But, if it were dangerous, then the negligence is not that of the non-seafaring claimants in being there, but that of the master in not warning them away and in not seeing to it that his command was obeyed.* He did neither, as will be demonstrated.

The burden of proving contributory negligence, of course, is upon petitioner:

> *Coggeshall Launch Co. v. Early,* 248 Fed. 1, at 5 (C. C. A. 9).

Aside from all other considerations, had the court or proctors in this case been on the vessel they would have been in the same place without a thought of any danger. When it is borne in mind that, *as a practical matter, it was the only place where they could be,* the assertion of petitioner collapses. The whole port side of the vessel was filled with equipment, as was the small space in her bow (Carlsen, *on the vessel*: 274, 275, 276; in the courtroom: 305, 307, 320, 321, 322). Even if there had been nothing in the space at her bow, it was obviously not a place for *anyone* to ride, much less *everyone.* The bow of a small boat, as the court knows, is constantly pounding up and down when she is in ordinary swells, slapping water out on both sides, so that there is more or less spray over the bow (Urquhart, 50, 51). The suggestion becomes humorous when it is borne in mind that *Captain Kruger himself* had no hesitation in being in the same place: for the testimony remains uncontradicted that *he was back there several times* (Cap. Kruger, 136,

137) and cleaning some fish for Carlsen (Carlsen, 294, 295, 309; Woods, 421), the Captain merely testifying that he didn't remember cleaning the fish, not that he did not do so (136, 137).

Moreover, petitioner's contention wholly disregards the most cogent of all evidence against contributory negligence: *the instinct of self preservation,* with which men working at the profession of claimants are naturally, through their experience, unusually endowed:

> "The probative force of this presumption in suits for personal injuries where the defense is contributory negligence has been recognized and enforced in many cases. We cite and quote from some of them.
>
> 'The natural instinct', says Agnew, J., in Allen v. Willard, 57 Pa. St. 374, 380, 'which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feelings and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries.'
>
> In the case of Railway Co. v. Price, 29 Md. 420, 438, the court said:
>
> 'These facts and the circumstances of the case were proper to be considered by the jury, and in connection with these facts and circumstances it was competent to the jury to infer the absence of fault on the part of the deceased from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty'."
>
> *The City of Naples*, 69 Fed. at 797 (C. C. A. 8th).

The master did not warn claimants to keep away from the stern (Reid, 366, 367; Woods, 420; Rowe, 424; Urquhart Dep., 44; Evans, 341; Haney, 255; Carlsen, 293, 294, 322, 323). *The master's own testimony shows that he never gave such a warning.* The most he *says* he said is that he said "to the men standing back aft" (33) *"to keep clear of the towline"* (95). He does not *say* that he told them not to remain *on the stern* (95, 137, 138), or that he said anything to the *two injured men* (95, 137, 138). He admits that the men did not reply to what he says he said, and may not have heard him:

> "Q. You say that they did not reply to you when you told them to stay clear of the line?
> A. *No, sir, they did not.*
> Q. How do you know they heard you when you said that?
> A. *I don't know, I wouldn't testify to that"* (Cap. Kruger, 137, 138).

Even if he did give any warning, he did not do so seriously, and made no attempt to see that it was observed. At most it was a casual remark:

> "Q. You were the captain on that boat, weren't you?
> A. Yes.
> Q. And you could tell them to go wherever you pleased, couldn't you?
> A. Yes.
> Q. And you could make them do it, couldn't you?
> A. Yes.
> Q. But you didn't do it, you let them stay right there?

A. That was their own lookout, not mine. If I tell a man to stay clear of a towline he ought to have sense enough to stay clear of it.

Q. And after you told them you went back and forth and you saw them there several times, didn't you?

A. Yes'' (Cap. Kruger, 137).

Obviously, *if the men were in a dangerous place they did not know or appreciate it, and the master could have avoided the danger, if he thought it existed, by emphasizing his warning, enforcing it, or if not then obeyed, by stopping the engines and keeping all strain from the line.* With these facts in mind, the application of the following authorities is clear. They are peculiarly in point on this phase of the case, and those decided by the Circuit Court of Appeals for this Circuit are particularly commended to its attention:

"The steerage passengers had the right to go on the steerage deck for air and exercise, and it was usual for them to do so when the conditions of weather and sea were favorable. When the conditions were not favorable, it was the duty, and the evidence shows that it was the custom, *of the officers of the vessel to so warn the passengers.* If the danger upon the deck was not apparent and obvious to the libelants, exercising reasonable care for their own safety, they assumed no risk, *unless warned by the officers of the vessel of the danger,* which was not a fact; and it does not appear from the evidence that the danger was obvious or apparent, or that the libelants had been on deck long enough to apprehend the danger from their own observation. The conclusion is that the libelants did not assume the risk, and that

they were not guilty of contributory negligence."

The Korea Maru, 254 Fed. at 400, 401 (C. C. A. 9);

Coggeshall Launch Co. v. Early, 248 Fed. 1 (C. C. A. 9).

"At the end of his direct examination this witness was asked, 'Did you have any means or power to prevent them?' to which question he answered: 'I had no power whatever, I was powerless. They took the command away from me, and took control of the boat, and I could not do nothing.'

A careful perusal of the entire testimony of this witness of itself shows that there was no justification whatever for his statement that the boat was started on its perilous journey against his protest, or that the control of it was taken from him by the passengers. *If powerless in the premises, it was only because he did not have the stamina to assert and exercise the authority with which he was clothed, and which the law and good seamanship made it his imperative duty to enforce. The evidence is overwhelming not only that he made no objection* to starting the boat with its overload, but that, according to his own testimony, one, at least, of his own sailors took an active part in shoving it off the sand and into a floating condition, which appears without conflict to have been a matter of considerable difficulty; so much so that several of the passengers had to assist the sailors in accomplishing it—some by means of oars, and others, having high boots, by getting into the water and pushing the boat.

Let it be assumed that, when the officer announced that the boat was overloaded and that it was 'risky', it became the duty of all the

passengers to get out—as well those who had entered when there was ample room as those who had caused the overloading—and that every one who remained thereupon became guilty of contributory negligence; *such fact becomes immaterial, in the face of the further fact that the officer, with full knowledge of the overloading and consequent dangerous condition of the boat, subsequently not only started it on its perilous trip, but, after starting, and while it was yet in smooth water, and after observing that it was down by the head, and with but little freeboard, made no effort whatever to return to the shore to make the boat safe by discharging some of the passengers. It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made nothing more than a milk and water protest against the entry of any one;* and even if there had been on the part of the passengers an effort to overpower the officer and force their way into the boat—of which there is not the slightest evidence—*it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe. Not the slightest attempt appears to have been made by this officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to the shore while he yet had sufficient opportunity, the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.* Grand Trunk Rv. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Louisville & Nash-

ville Ry. Co. v. East Tennessee, V. & G. Ry. Co., 60 Fed. 993, 9 C. C. A. 314; Harrington v. Los Angeles Ry. Co. (1903, Cal.), 74 Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of Lynn v. Southern Pacific Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

> 'The defendant should not have allowed so many passengers to have gone upon its cars, and, *if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances;* but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers, by reason of the overcrowded condition of the cars.'

So, here, as has already been said, *if the officer in command of the boat had been unable to prevent its overloading (of which, however, there was no evidence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to.* But speculation on that

point is no answer to the gross neglect of duty on the part of the officer of the ship."

Weisshaar v. Kimball S. S. Co., 128 Fed. at 400, 401 (C. C. A. 9); 194 U. S. 638; 48 L. Ed. 1162;

The Erastus Corning, 158 Fed. 452 (D. C. Conn.);

Nor. Comm. Co. v. Nestor, 138 Fed. 383 (C. C. A. 9).

"The preponderance of the evidence convinces the court that Christensen saw Nelson just before or at the time the whistle sounded. *He therefore knew that the libelant was in a dangerous position, and even then it was his duty, either to see that the libelant moved from that position of danger, or to see that the gypsy was at once thrown out of gear, so as to avoid the great peril in which the libelant was placed.* For although the libelant had placed himself in a position of some peril which he knew, namely by being within the bight of a rope, the great peril was a peril which he did not know. That peril resulted from the fact that the gypsy head was in gear, so that when steam was given to the engine great danger would ensue to any one in that vicinity.

The principle that the party who has the last opportunity of avoiding the accident is not excused by the negligence of any one else has now become settled law. It is a familiar rule that *where the plaintiff's negligence is so communicated by knowledge that by the exercise of ordinary care and skill the defendant might have avoided the injury the plaintiff's negligence cannot be set up in defense of the action."*

The Steam Dredge No. 1, 122 Fed. at 685 (D. C. Md.).

It has thus been proved, not only that the injured men were not contributorily negligent if the place where they were located was safe; not only that they were not contributorily negligent if it was dangerous; but that if it was dangerous the master (and hence petitioner), was negligent because he *(1) did not order them away from it and (2) did not enforce such command.*

Even had the men been guilty of any contributory negligence, however, it would not defeat recovery, as at common law, but would merely have the effect of *dividing the damages in proportion to the negligence* on each side—not equally as in the case of collisions between vessels:

The Tourist, 265 Fed. at 704 (D. C. Md.);
The Max Morris, 24 Fed. 860, 864; 137 U. S. 1; 34 L. Ed. 586;
The Devona, 285 Fed. 173, 178 (D. C. Me.);
The Iowan, 1923 A. M. C. 303 (D. C. Ore.).

Second: The Petitioner Is Not Entitled to Limit Its Liability.

"The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. Parsons v. Empire Trading & Trans. Co., 111 Fed. 208, 49 C. C. A. 302; The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; In re Myers Excursion Co., (D. C.) 57 Fed. 240; The Republic, 61 Fed. 109, 9 C. C. A. 386;

Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438; The Colima, (D. C.) 82 Fed. 665."

McGill v. Mich. S. S. Co., 144 Fed. at 795-6 (C. C. A. 9);

Re Reichert Towing Line, 251 Fed. 214 (C. C. A. 2);

The Hewitt, 1923 A. M. C. 89; 284 Fed. 911.

It must be apparent from what has already been said under heading "First", supra, that petitioner did not sustain such burden. Since the facts have been quite fully discussed under that heading there is no occasion for repeating them here.

It has been shown, beyond question, that the bridle was unseaworthy, and that petitioner's Port Engineers Carlton and Davis, as well as Captain Kruger, were negligent. This being so, petitioner's *sole remaining contention* in support of its asserted right to limit liability, is that the negligence of its Port Engineers and/or its master *is not the negligence of petitioner* under the Limitation of Liability *Act.* In other words, petitioner's sole remaining contention is that, petitioner being *a corporation,* it need only show that its *technical corporate* officers (president, vice-president, secretary, etc.) were not negligent, in order to limit its liability. This construction of the Limitation of Liability Act as applied to corporations is *wholly erroneous*, as will now be shown.

1. The Petitioner Corporation Was Privy To and Had Knowledge Of the Negligence Shown Under Heading "First" Supra.

(a) The Negligence of Petitioner's Port Captain and/or Its Master Was Petitioner's Negligence Under The Limited Liability Act Assignment of Errors XXVI, XXVII, XXVIII, XXIX, 486, 487).

Petitioner cannot deny that if the bridle or swivel were defective, and its *president,* for instance, had been in charge of the "Three Sisters" at Point Reyes, and had not there made any examination of them (as is the fact both as to petitioner's port captain Davis and master Kruger), it would not be entitled to limit its liability. But petitioner's contention is that even though its port captain or its master (who was directly employed by its president: 70, 223) were negligent, the negligence of either or both of them does not charge petitioner under the limited liability act. *This assumption is plainly erroneous.*

The voyage under consideration, and with which alone claimants were concerned, was from Point Reyes to San Francisco—not a round voyage from San Francisco to Point Reyes and return. The only representatives of petitioner at Point Reyes when or before the voyage to San Francisco commenced were port captain Davis, the master and the deckhand. The record, without dispute, shows that none of them there made any inspection of the towing equipment. Davis was at Point Reyes on the day before the voyage to San Francisco began (Carlsen, 291, 292), but the record shows no inspection by him. Claimant Carlsen told Davis, at Point

Reyes, that the master of the "Three Sisters" was lying at Point Reyes waiting to take the men to San Francisco, that they were going on her, and that her master had told Carlsen that he had orders to wait for them (Carlsen, 292).

It would seem to be obvious that a corporation cannot escape full liability by taking the precaution of keeping *its officers in one place, and operating its vessel from another place where its only representatives are its port engineer and master.* A. Paladini, the president of petitioner corporation, himself testified that "the actual operation of the vessels, the equipment of the vessels, the running of the vessels" was *entrusted to its port engineer* (Paladini, 224 et seq.).

The port engineer was Davis, who, therefore, was the *managing officer of the petitioner* as to its vessels. That what such an officer knows, or should know, the corporation knows or should know is clear:

> "As the petitioner is a corporation, its 'privity or knowledge' must be that of its managing officers. Craig v. Continental Ins. Co., 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886. While ordinary agents and servants, including a master of a vessel, are not within that category, a 'managing officer' is not necessarily one of the head executive officers, *but is any one to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business.* The Colima (D. C. S. D. N. Y.) 82 Fed. 665; Parsons v. Empire Transp. Co., 111 Fed. 202, 49

C. C. A. 302 (C. C. A. 9th Cir.), certiorari denied 183 U. S. 699, 22 Sup. Ct. 935, 46 L. Ed. 396; Oregon Lumber Co. v. Portland & Asiatic S. S. Co. (D. C. Or.) 162 Fed. 912; Sanbern v. Wright & Cobb Lighterage Co. (D. C. S. D. N. Y.) 171 Fed. 449, affirmed 179 Fed. 1021, 102 C. C. A. 666 (C. C. A. 2nd Cir.); In re Jeremiah Smith & Sons, Inc., 193 Fed. 397, 113 C. C. A. 391 (C. C. A. 2nd Cir.); Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703, 117 C. C. A. 97 (C. C. A. 9th Cir.); The Teddy (D. C. W. D. N. Y.) 226 Fed. 498. The petitioner, long before the accident in question, had committed the general management and superintendence, including maintenance and repair of its vessels, to a superintendent of its marine department. *The latter was therefore clearly a managing officer of the corporation within the before-mentioned rule, and his 'privity or knowledge', if any, is chargeable to the petitioner.*"

Erie Lighter 108, 250 Fed. at 494 (D. C. N. J.);

Weishaar v. S. S. Co., 128 Fed. 400 (C. C. A. 9th), certiorari denied 194 U. S. 638; 48 L. Ed. 1162.

"It also appears plainly enough that the *superintendent of the defendant* was empowered to direct claimant as to the manner in which the work was to be performed, and that in the exercise of a proper degree of care he should have caused an inspection of the bridge to have been made before directing that it be used as a leverage for the hoist. He knew, or should have known, that the bridge was incapable of bearing the strain of the A-frame, *and his knowledge must be deemed to be the knowledge of the owner, within the meaning of section*

4283 of the Revised Statutes, providing for the limitation of liability of shipowners for losses caused without their privity or knowledge. In re Jeremiah Smith & Sons, 193 Fed. 395, 113 C. C. A. 391."

The Teddy, 226 Fed. 498 (D. C. N. Y.);

The Colima, 82 Fed. 665 (D. C. N. Y.);

Ore. Lumber Co. v. Portland etc. S. S. Co., 162 Fed. 922 (D. C. Ore.);

Re Reichert Towing Line, 251 Fed. at 217 (C. C. A. 2);

Myers Excursion & Nav. Co., 57 Fed. 240; Affirmed: *The Republic,* 61 Fed. 109 (C. C. A. 2).

"It is well settled that the owner of a vessel is not entitled to limit its liability arising from unseaworthiness of a vessel. If the libelant was ignorant of the condition of the vessel, it was because of a negligent examination, as in The Republic, 61 Fed. 109, 9 C. C. A. 386."

Braker v. Jarvis Co., 166 Fed. 987, at 988 (D. C. N. Y.).

Where such managing officer is *at a port other than that where the technical officers are* present, the corporation is *doubly* chargeable with and privy to the negligence of such managing officer, as this Honorable Court has clearly pointed out, in denying limitation for a loss due to unseaworthiness of a barge:

"The appellee, being a corporation, *necessarily acts through agents of different kinds.* * * * Surely the man to whose management the company's entire fleet of boats in those remote

waters, as well as all its property in that region, was entrusted, should be regarded as the company's representative, and his dispatch of any of the company's boats to a neighboring point as being at least within his ostensible authority. *His knowledge must, therefore, be regarded as his company's knowledge, and his acts as the acts of the company.* That it was gross negligence to ship goods from St. Michael to Nome at the beginning of the winter season in barge No. 2 has already been sufficiently shown. But the appellee, through its superintendent, was guilty of further negligence in failing to send one of its tugs, and tow the barge to a place of safety, which the evidence shows might very readily have been done by the exercise of reasonable diligence. The truth is, as is abundantly shown by the record, that Patterson knew nothing about the shipping business, and was wholly unfit for the position in which the appellee permitted him to remain, and thus held him out to the public."

Parsons v. Empire Shipping Co., 111 Fed. 202, at 208 (C. C. A. 9th); *certiorari denied:* 183 U. S. 699; 46 L. Ed. 396;

The Barkentine Rolph, 1924 A. M. C. 942; 299 Fed. 52 (C. C. A. 9th).

Of course limitation is not allowed where an owner does not *actually know* of a defect or negligence, if he was *negligent in not knowing* of it. An owner cannot shut his eyes to negligence as a means of avoiding privity or knowledge of it. Privity or knowledge includes:

"*means of knowledge, of which he is bound to avail himself* of a contemplated loss, or of a

> condition of things likely to produce or contribute to the loss, *without adopting appropriate means to prevent it.* * * * It is the duty of the owner, however, to provide the vessel with a competent crew; and to see that the ship, *when she sails,* is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act."
>
> *Lord v. Goodall S. S. Co.,* 15 Fed. Cas. No. 8506, p. 887 (D. C. Cal.).

Even if Davis had not been at Point Reyes, therefore, the master would have been the managing officer with whose negligence petitioner would be charged and to whose negligence it would be privy. But port captain Davis was there.

Moreover, even had Davis not been at Point Reyes, and even if the master would not then have been the only managing officer there, nevertheless, as pointed out in detail under division "First", supra, and heretofore under the present division, Davis was negligent at San Francisco *in not examining the bridle and swivel,* or, assuming he did so, in examining them only *casually*:

> *Oregon Lumber Co. v. Portland & Asiatic Co.,* 162 Fed. 922 (D. C. Ore.), quoted supra;
>
> *McGill v. Michigan S. S. Co.,* quoted supra.

So that, its *port engineer,* having been negligent, whether at Point Reyes or at San Francisco, *petitioner was negligent and charged with privity and knowledge under the limited liability law.* It has already been pointed out that Carlton, who was port engineer at some time, made no examination of the swivel or bridle; and the fact that petitioner deliberately left a hiatus in the record as to when Carlton ceased to be port engineer and when Davis succeeded him is to be borne in mind. Neither Davis, Carlton nor Paladini would say when Davis replaced Carlton.

(b) The Port Captain and the Master Were Incompetent (Assignment of Errors XXIX, 487).

Petitioner's port captain Davis and its master were employed by its president. *Both were shown by their conduct to be incompetent.* The record shows no exercise of due diligence in selecting the master. Since the petitioner is bound by and privy to Davis' negligence, whether or not due diligence was used in selecting him is not material, as has been shown; but the record does not show that due diligence was used in selecting him. Moreover, the conduct of Davis and the master, which has already been detailed, proves that no diligence was used in the selection of either of them:

> "The acts of Evers in handling the oil, and his testimony in regard to his knowledge of its properties, *are such as to carry the conviction that he did not have the knowledge and experience necessary to render him competent to*

have charge of the work involved in changing the vessels of the Steamship Company from coal-burners to oil-burners, and the care and protection of the oil. He had no knowledge of the properties of California fuel oils. There is no evidence that he thought it necessary to acquaint himself with their properties. He handled the oil with apparently no regard to the danger involved.

The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. (Citing cases.) In the Cygnet, 126 Fed. 742, 61 C. C. A. 348, the Circuit Court of Appeals held that the analogous provisions of the Harter Act cannot be invoked to relieve a vessel from liability for a loss occurring from errors in navigation on the part of the master *sufficiently negligent to raise a presumption of his incompetency merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent.* The Court said:

> 'There is no evidence in the record that the owners of the tug, either the record owners or the owner pro hac vice, had made any particular inquiries as to his competency. The petitioners seem to think that it is sufficient to maintain their case that the owner or owners had no reason to believe that the master was not competent; but this form of statement is not sufficient, because it does not comply with the statute, which requires "due diligence".'

Referring to the negligent act of the master *in failing to observe whether his tow was straightened out on its course,* the court said:

> 'An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden on the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or not impose such a burden.'
>
> The language of the court in that case is, we think, applicable to the present case. *The acts of Evers and his testimony are such as to raise a strong presumption of his incompetency.* The steamship company has introduced no testimony whatever, either to show that he was competent or to indicate that at the time of changing its vessels from coal-burners to oil-burners, or at any time, it made any inquiry as to his knowledge of the properties of the dangerous agency they were about to introduce upon their vessels, or his fitness to handle it. The limitation of its liability must be denied."
>
> *McGill v. Michigan S. S. Co.,* 144 Fed. 788, at 795 (C. C. A. 9);
>
> *The Cygnet,* 126 Fed. 742 (C. C. A. 1).

2. The Petitioner Is Not Entitled to Limit Its Liability for Injury to Claimants, Who Were Passengers, Because of R. S. 4493 (Assignment of Errors XXX, XXXI, 487).

The injured claimants having been passengers on the "Three Sisters", which was therefore as to them, a passenger vessel, are precisely within R. S. 4493. If petitioner claims that she was not a passenger vessel it cannot deny that she was at least a "tug-boat, towing-boat and freight-boat" under R. S. 4427. It will only be necessary to quote these statutory provisions, with the amendment of 1918 to R. S. 4493, and to refer this court to its own decision in

the *"Annie Faxon"* to show that petitioner is not entitled to limit its liability, even assuming that it had no privity or knowledge of the deficiency of the bridle and swivel or of the negligence of its servants. *When petitioner used the "Three Sisters" to carry passengers, without having her inspected, or obtaining a certificate of inspection, petitioner withdrew itself from the protection of the limited liability law.*

> "Sec. 4493. (Liability of master and owners for damage to passengers.)
>
> Whenever damage is sustained *by any passenger* or his baggage, from explosion, fire, collision *or other cause,* the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured *to the full amount of damage if it happened through any neglect or failure to comply with the provisions of this Title,* or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such master, mate, engineer, or pilot."
>
> 9 Fed. Stat. Ann., 2nd 468.

This section imposes the further *condition* upon the right to limitation of liability for injuries to passengers that the petitioner *is not entitled to limit unless it has complied with the inspection*

laws. The Title referred to in R. S. 4493 is "Steam Vessels;" but by amendment of 1918, "steamer" was changed to "any vessel":

> "Sec. 4465. It shall not be lawful to take on board of any vessel a greater number of passengers *than is stated in the certificate of inspection,* and for every violation of this provision the master or owner shall be liable to any person suing for the same to forfeit the amount of passage money and $10 for each passenger beyond the number allowed.
>
> The master or owner of the vessel, or either or any of them, who shall knowingly violate this provision shall be liable to a fine of not more than $100 or imprisonment of not more than thirty days, or both."
>
> Fed. Stat. Ann. 1918 Supp. 827.

> "Sec. 4427. (Tug boats, freight boats, etc.) The hull and boiler of *every tug-boat, towing-boat, and freight-boat* shall be inspected, under the provisions of this Title; and the inspectors shall see that the boilers, machinery, *and appurtenances* of such vessel are not dangerous in form or workmanship, and that the safety-valves, gauge-cocks, low-water alarm-indicators, steam-gauges, and fusible plugs are all attached in conformity to law; and the officers navigating such vessels shall be licensed in conformity with the provisions of this Title, and shall be subject to the same provisions of law as officers navigating passenger-steamers."
>
> 9 Fed. Stat. Ann. 2nd 437.

It is admitted that the "Three Sisters" had no "Certificate of Inspection" (442) and none was produced. Therefore, *even were petitioner not charge-*

able with privity and knowledge, nevertheless it would not be entitled to limitation:

> *"There is in the record, it is true, no distinct or positive evidence that the failure to inspect the boiler after the repairs of June, 1883, was the cause of the explosion, or that an inspection at that time would necessarily have disclosed the imperfections, and the weakness which resulted in the accident. It can only be said that if a proper inspection had been made at that time the weakness of the boiler would probably have been detected.* As we construe the statute, it was as much the duty of the owner of the steamship to cause an inspection of a boiler that had been repaired in a substantial part, as it was to cause an inspection of a new boiler, before using the same. The repaired boiler was, to all intent, a new boiler. If, in this case, the explosion had been of a new boiler that had never been used, *it could scarcely be contended, we think, that the owner would not be liable for the full extent of the injuries to the passengers under the provisions of section 4493. That section was intended for the better protection of the life of passengers, and, if it be not given the construction which we have placed upon it, its purpose will not be accomplished.* Probably it could never be proven in any given case of explosion that the accident occurred through a failure to inspect the boiler. *There would be little or no protection* in holding that, after an explosion, an injured passenger, in order to recover under section 4493, must prove that, notwithstanding the absolute failure to comply with the inspection law, there were in the boiler defects that would necessarily have been detected if an inspection had been made before using the same. We are unable to find that a construction has been

placed upon this statute by any court. In Butler vs. Steamship Co., on page 553, 130 U. S., and page 618, 9 Sup. Ct., Mr. Justice Bradley said:

> 'Perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability. That is all. We say "perhaps," for it has never yet been decided, at least by this court, that the owner cannot claim the benefit of limited liability when a disaster happens to a coastwise steamer without his fault, privity, or knowledge, even though some of the requirements of the steamboat inspection law may not have been complied with.'

The construction which we have given to the statute seems to us just and reasonable, and consonant with the purposes for which the law was made. It is true that in the pleadings no reference is made to the failure of the railway company to inspect the boiler after it was repaired, and no ground of liability is charged against the company, under the provisions of section 4493, by any of the injured passengers, or their representatives. On the contrary, they all seek to recover on the ground of the negligence of the company in continuing the use of a boiler known to be old and defective. But we do not regard these facts as material. *The failure to comply with the inspection law may, in our judgment, be invoked to prove that the owner is not entitled to the benefit of the limitation of liability law, as claimed in the libel and petition."*

The Annie Faxon, 75 Fed. 312 (C. C. A. 9);

Followed: *Hines v. Butler,* 278 Fed. at 881, (C. C. A. 4); Certiorari denied 257 U. S. 659; 66 L. Ed. 421.

IV.

CONCLUSION.

It is respectfully submitted that the decree of the lower court should be reversed, and that this Honorable Court should hold: (1) that petitioner was negligent and liable for the injuries sustained by claimants; (2) that petitioner is not entitled to limit such liability; and (3) that the injunction issued by the District Court be dissolved and the actions filed by claimants in the State Court be allowed to proceed.

Dated, San Francisco,
March 4, 1925.

Respectfully submitted,
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